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# Arbitrating Job Security Issues Under The Public School Code And Act 195-The Neshaminy Legacy

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# Arbitrating Job Security Issues Under The Public School Code And Act 195—The *Neshaminy* Legacy

## I. Introduction

The topic of public sector labor law has been a constant source of controversy and discussion,[1] and the rights and duties of public school teachers have been at the forefront of this controversy. Traditionally, collective bargaining agreements between school districts and school district employees' labor organizations have contained provisions dealing with job security,[2] and the alleged violations of those provisions proceeded the route of grievance arbitration. Until recently, allegedly wrongful discharges[3] of professional employees

1. For an overview of public sector labor law in Pennsylania since the Public Employee Relations Act was enacted, see Cowden, *Rights of Public Employees and Public Employee Unions Under Article IV of Pennsylvania's Public Employe Relations Act*, 83 DICK. L. REV. 685 (1979); Thrush, *A Survey of Public Sector Collective Bargaining Law in Pennsylvania*, 83 DICK. L. REV. 755 (1979); Comment, *Judicial Review of Labor Arbitration Awards Under Pennsylvania's Public Employe Relations Act*, 83 DICK. L. REV. 795 (1979) [hereinafter cited as Comment, *Judicial Review*]; Comment, *A Power Shift in Public School Management*, 80 DICK. L. REV. 795 (1976) [hereinafter cited as Comment, *A Power Shift*]; Comment, *The Public Employe Relations Act and Pennsylvania Teachers: A Legal Analysis in Light of the January 1971 Pittsburgh Dispute,*, 10 DUQ. L. REV. 77 (1971); Comment, *The Scope of Collective Bargaining in Public Education Under the Pennsylvania Public Employe Relations Act*, 14 DUQ. L. REV. 427 (1976); Comment, *Scope of Collective Bargaining Under the Public Employees' Relations Act*, 38 U. PITT. L. REV. 200 (1976).

2. An overwhelming number of collective bargaining agreements limit an employer's right to discipline. Close to 90% of union contracts nationwide specify that employees may not be discharged without "just cause." H. DAVEY, M. BOGNANNO AND D. ESTERSON, CONTEMPORARY COLLECTIVE BARGAINING 281 (4th ed. 1982). From an employee's point of view, the optimum job security provision permits an employee to grieve any adverse personnel action by his employer. The following model "just cause" clause is representative of those bargained between PSEA locals and employer school districts:

> No member of the bargaining unit shall be discharged, disciplined, suspended, furloughed/laid off, reprimanded, adversely or unsatisfactorily evaluated, reduced in rank or compensation, transferred, reassigned, or deprived of any professional advantage without just cause.

PSEA Staff, *Collective Bargaining Reference Manual* 35 (1979).

3. The term "wrongful discharge" has become a term of art denoting the cause of action that a person employed at will (i.e., without contract) may maintain when discharged in violation of a "clear mandate of public policy." *See* Geary v. U.S. Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974). Although the cause of action has not been fully recognized by the Pennsylvania Supreme Court, the court in *Geary* indicated that, given the right fact situation, it would allow a discharged employee to maintain a cause of action. *See also* Decker, *At-Will Employment in Pennsylvania—A Proposal For its Abolition and Statutory Regulation*, 87 DICK. L. REV. 477 (1983); Blades, *Employment At Will v. Individual Freedom: On Limiting The Abu-*

could proceed through the grievance procedure, culminating in arbitration, so long as it appeared that the parties had agreed to do so in the collective bargaining agreement itself.[4] The Public Employe Relations Act of 1970 (Act 195)[5] made arbitration of all grievances arising out of a collective bargaining agreement[6] between professional employees[7] and school districts mandatory.[8]

In July 1983, however, the Pennsylvania Supreme Court, in *Neshaminy Federation of Teachers v. Neshaminy School District*[9] (*Neshaminy*), handed down a decision that representatives of the public sector labor field viewed as "devastating"[10] and "totally unexpected."[11] In *Neshaminy*, the court held that a professional employee's dismissal was not arbitrable for two reasons: (1) the parties to the collective bargaining agreement did not intend dismissals to be arbitrable by the mere negotiation of a "just cause discipline"[12]

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*sive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).

For purposes of this comment, however, the term "wrongful discharge" means a discharge which is in violation of statute or collective bargaining agreement.

4. See *infra* notes 130-190 and accompanying text for discussion of judicial standards of review of arbitration awards.

5. Act of July 23, 1970, Pub. L. 563 No. 195, PA. STAT. ANN. tit. 43, §§ 1101.101-1101.2201 (Purdon Supp. 1983-84). Act 195 is the common name for the Public Employees' Relations Act. The name is derived from its order of enactment in the 1970 General Session.

6. A collective bargaining agreement is a contract between an employer and employees; all rights flowing from it are contractual rights. Thus, this comment will use the terms "collective bargaining agreement," "contract," and "agreement" interchangeably.

7. "Professional Employee," as used in the Public School Code, is a term of art referring to all tenured teachers. The definitions of the two classes of school employees to which this comment will refer are as follows:

> 1) The term "professional employee" shall include those who are certificated as teachers, supervisors, supervising principals, principals, assistant principals, vice principals, directors of vocational education, dental hygienists, visiting teachers, home and school visitors, school counselors, child nutrition program specialists, school librarians, school secretaries, the selection of whom is on the basis of merit as determined by eligibility lists and school nurses.
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> 3) The term "temporary professional employee" shall mean any individual who has been employed to perform, for a limited time, the duties of a newly created position or of a regular professional employee whose services have been terminated by death, resignation, suspension, or removal.

Act of Mar. 10, 1949, Pub. L. 30, art. XI, § 1101, *as amended*, PA. STAT. ANN. tit. 24, § 1101 (Purdon Supp. 1983-84).

The distinguishing feature between "professional employees" and "temporary professional employees" is that professional employees have acquired tenure. *See* Phillippi v. School Dist. of Springfield Township, 28 Pa. Commw. 185, 367 A.2d 1133 (1977).

8. PA. STAT. ANN. tit. 43, § 1101.903 (Purdon Supp. 1983-84) (for text of Section 1101.903, see *infra* note 40). The effect of Act 195 upon public school teachers has been the source of much criticism. For a brief and informative review of the effectiveness of Act 195 in negotiations between state employees and the state, see Brutto, *Act 195 Has Been Effective for State*, Sunday Patriot-News, Sept. 11, 1983, at D 1.

9. 501 Pa. 534, 462 A.2d 629 (1983).

10. Letter from Anthony D. Newman, General Counsel for the Pennsylvania State Education Association (PSEA), to PSEA Field Staff and Regional Attorneys (July 14, 1983).

11. Telephone Interview with Michael Brodie, Attorney of Record for the Federation of Teachers in *Neshaminy* (Sept. 8, 1983).

12. The "just cause" discipline clause provided that: "An Employee will not be disciplined, reprimanded, reduced in rank, contractual compensation or contractual advantage

clause, and (2) more crucially, to allow dismissals[13] to be arbitrated would supersede the Public School Code[14] and violate Act 195.[15]

In determining that a "discipline" clause did not include dismissals and that the arbitrator's award was therefore not rationally derived from the collective bargaining agreement, the Pennsylvania Supreme Court has raised questions about the scope of appellate review of an arbitrator's award in the public sector.[16] More importantly, the court's conclusion that professional employee dismissals apparently are per se not arbitrable creates considerable confusion regarding the decision's impact upon other employer actions, as well as upon other classes of employees.[17]

This comment will analyse the impact and implications of the *Neshaminy* opinion that the arbitration of professional employee dismissals violates the Public School Code and Act 195,[18] address the inequities that *Neshaminy* has created and discuss three proposals that the General Assembly seriously should consider in order to avoid an unfair system of teacher tenure,[19] and finally, discuss the ongoing struggle of determining the appropriate standard of review of public sector arbitration awards, and evaluate the application of that standard[20] both in general terms and in light of *Neshaminy*.[21]

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without just cause. Any just [sic] actions asserted by the board or any agent or representative thereof should be subject to the grievance procedure herein described." Collective Bargaining Agreement between the Neshaminy Federation of Teachers and the Neshaminy School District, Art. IV, § 4-2, *quoted in Neshaminy*, 501 Pa. at 541, 462 A.2d at 633.

The other agreement provision relevant to discussion of *Neshaminy* provided that: "Nothing contained herein shall supersede the provisions of the school laws of Pennsylvania, 1949, as amended, or other applicable laws and regulations." *Id.* at § 4-1, *quoted in Neshaminy*, 501 Pa. at 541, 462 A.2d at 632-33.

13. The terms "dismissal" and "discharge" are used interchangeably in this comment. Each is intended to denote the termination of a contract by an employer, standards for which are discussed *infra* note 28.

14. Act of March 10, 1949 Pub. L. 30, PA. STAT. ANN. tit. 24, §§ 11-1126 to 11-1131 (Purdon Supp. 1983-84).

15. PA. STAT. ANN. tit. 43, § 1101.703.

16. *See generally Comment, Judicial Review, supra* note 2 (criticizing the heretofore accepted standard of review in the public labor sector; *see also infra* notes 158-199 and accompanying text for discussion of the essence test standard of review and its appropriateness in the public sector, as well as its application in *Neshaminy*).

17. See *supra* note 7 for a definition of "temporary professional employee."

18. *See infra* notes 34-79 and accompanying text. *Neshaminy* has created a situation in which tenured teachers are provided less protection from unjust discharges than are non-tenured teachers who have negotiated a dismissal clause in the collective bargaining agreement. In *theory*, a tenured teacher has greater rights than a nontenured teacher since the School Code mandates a dismissal hearing only for tenured teachers. In *practice*, however, nontenured teachers have greater rights because of the opportunity to choose their forum of review. *See infra* notes 80-88 and accompanying text. Further, where suspension and demotion procedures have been included in the collective bargaining agreement, tenured teachers now have more protection when suspended or demoted than when discharged. *See infra* notes 89-98 and accompanying text.

19. *See infra* notes 80-129 and accompanying text.

20. *See infra* notes 130-198 and accompanying text.

21. Although it is generally agreed that an arbitrator's award will not be overturned so long as it is rationally derived from or within the "essence" of the collective bargaining agree-

## II. The Supreme Court Decision in *Neshaminy*

### *A. Factual Background of Neshaminy*

Robert Hess began teaching in the Neshaminy School District in 1965 and subsequently had been granted tenure.[22] In August 1977, Mr. Hess began to drink heavily because of the pressure and tension of a hostile relationship with his ex-wife.[23] On September 24, 1977, Hess started drinking heavily following a heated dispute with his ex-wife and an encounter with additional anxieties at home.[24] Sometime around 3:00 a.m. that night, after a drinking binge of some nine hours, Hess woke his wife and threatened to kill himself and "all the others" with a shotgun.[25] The police were alerted, arrived, and arrested him.[26] The day after his release from jail, Hess began out-patient treatment at an alcoholic treatment center and joined Alcoholics Anonymous.[27] Although he missed two days of

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ment, *see* Scranton Fed'n of Teachers v. Scranton School Dist., 498 Pa. 58, 444 A.2d 1144 (1982); Leechburg Area School Dist. v. Dale, 492 Pa. 515, 424 A.2d 1309 (1981); Ringgold Area School Dist. v. Ringgold Educ. Ass'n, 489 Pa. 380, 414 A.2d 118 (1980), the adoption of this "essence test" since enactment of Act 195 has not been a smooth one. *See infra* notes 152-162 and accompanying text.

Additionally, commentators have attacked the "essence test" as inappropriate in public sector labor disputes; at times, Pennsylvania appellate courts have given it nothing more than lip service. *See* Comment, *Judicial Review*, *supra* note 1, at 811-815. The "essence test" is no less appropriate in the public sector than in the private sector. Courts should not substitute their own judgment for that of the arbitrators, (as was done in *Neshaminy*), especially under the guise of the "essence test."

As discussed later in this comment, an appellate court must accept the arbitrator's version of the facts when reviewing an arbitration award and limit its determination to whether the award was rationally derived from the collective bargaining agreement. The court inquires only into legal error and whether the award drew its essence from the agreement. *See* McKeesport Area School District v. McKeesport Area Educ. Ass'n, 56 Pa. Commw. 224, 424 A.2d 979 (1981); *see also* Community College of Beaver County v. Community College, Society of the Faculty, 473 Pa. 576, 375 A.2d 1267 (1977). *See* discussion, *infra* notes 163-175 and accompanying text.

22. Hess taught junior high school in another school district from 1958 to 1965. W. Weinberg, *Award of Arbitrator in the Arbitration between Neshaminy School District and Neshaminy Federation of Teachers* at 12 [hereinafter cited as *Arbitration Award*].

23. Hess' ex-wife apparently contacted friends, the school administration, police, relatives, and others, in what Hess believed was an irrational campaign of harassment. The relationship was decidedly abrasive on matters of visitation involving their children. *Id.*

24. On that day, when he went to pick up his children in the morning, Hess' ex-wife subjected him to "screaming and hollering" which left him shaken. At dinner time, Hess was repulsed by an uninvited guest who had launched into a dissertation of his own domestic difficulties. After the uninvited guest and Mrs. Hess' adult daughter and son-in-law departed for the evening, the Hesses argued, sometimes heatedly. When the three guests returned, at approximately 2:30 a.m., Hess felt that they were embarrassed by him. He continued to resent the uninvited guests for having stirred things up. *Id.* at 12-13.

25. *Id.* at 13.

26. Mrs. Hess was able to awaken her daughter and alert her to the gravity of the situation. The daughter and her husband escaped from the house by tying bedsheets together and climbing out a window. They subsequently notified the police. *Id.* at 13.

27. Hess was under the care of a counselor at the alcoholic treatment center. He also began therapy with a psychiatrist. His wife, who had left him to stay with relatives the day after the incident, was so impressed with his efforts that following a second courtship she

work while in jail following his arrest, he resumed teaching without problem or complaint. Nine months later the school board dismissed[28] him for "immorality,"[29] after he was convicted of simple assault, aggravated assault, reckless endangerment, terroristic threats, and unlawful restraint against his wife.[30] Pursuant to the collective bargaining agreement, Hess took his dismissal to arbitration, thus foregoing his right of appeal to the Secretary of Education.[31] After determining that "dismissals were included in the collective bargaining agreement by virtue of a discipline clause,"[32] the arbitrator held that Hess had not been dismissed for just cause.[33]

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reconciled with him prior to the Thanksgiving holidays. *Id.* at 14.

28. The provisions relating to dismissal procedure are contained in the Public School Code, tit. 24, §§ 11-1126 to 11-1131. Section 11-1127 provides in part:

> Before any professional employee . . . having attained the status of permanent tenure is dismissed by the Board of School Directors, such Board of School Directors shall furnish such professional employee with a detailed written statement of the charges upon which his or her proposed dismissal is based and shall conduct a hearing. . . .

PA. STAT. ANN. tit. 24, § 11-1127 (Purdon Supp. 1983-84).

Section 11-1131 provides in part:

> In case the professional employee concerned considers himself or herself aggrieved by the action of the Board of School Directors, an appeal . . . may be taken to the Superintendent of Public Instruction at Harrisburg. Such appeal shall be filed within thirty (30) days after receipt by registered mail of the written notice of the decision of the Board. . . .

PA. STAT. ANN. tit. 24, § 11-1131 (Purdon Supp. 1983-84).

29. Under § 11-1122 of the Public School Code, "immorality" is one cause for which a school district may validly terminate a professional employee's contract. Section 11-1122 provides in part:

> The only valid causes for termination of a contract hereafter entered into with a professional employee shall be immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, advocation of or participating in unAmerican or subversive doctrines, persistent and willful violation of the school laws of this Commonwealth on the part of the professional employee. . . .

PA. STAT. ANN. tit. 24, § 11-1122 (Purdon Supp. 1983-84).

The Pennsylvania Commonwealth Court has defined immorality under this section as such "a course of conduct as offends the morals of the community and is a bad example to youth whose ideals a teacher is supposed to foster and elevate." Penn Delco School Dist. v. Urso, 33 Pa. Commw. 501, 510, 382 A.2d 162, 167 (1978).

30. Hess was found not guilty of terroristic threats against his son, Preston Hess, and his wife's daughter and son-in-law, Karen and Kevin Amey. He was sentenced to fifteen days of limited confinement, which meant that he was released during each day. *Arbitration Award* at 14.

31. Section 11-1131 of the School Code, *see supra* note *28*, which provides for the appeal of a school board dismissal, refers to the "Superintendent of Public Instruction at Harrisburg." As utilized in the School Code, this title is synonymous with "Secretary of Education."

32. *See* Article IV, § 4-2 of the collective bargaining agreement, *supra* note 12. See also *infra* notes 176-177 and accompanying text for discussion of a Pennsylvania Supreme Court holding that the "just cause" standards in a collective bargaining agreement are not in conflict with expressed statutory reasons for employer actions, such as suspension, demotion, or dismissal.

33. See *infra* notes 178-189 and accompanying text for a complete discussion of the reasonableness of the arbitrator's conclusion that the dismissal was not for "just cause."

## B. *Review of Neshaminy in Context of Supreme Court Precedent*

*1. The Rule in Neshaminy.*—In *Neshaminy*, the parties had agreed at the collective bargaining stage that no professional employee could be "disciplined . . . without just cause." At arbitration, Hess was awarded reinstatement after the arbitrator determined that "discipline" included "dismissals," and that Hess was dismissed without "just cause." On appeal, the Pennsylvania Supreme Court ruled that a dispute over the dismissal of a professional employee is not arbitrable,[34] and that the dismissal provisions of the Public School Code are exclusive[35] with respect to professional employee dismissals.[36] In so holding, the court made a *de novo* factual determination that "dismissals" were not covered by the "discipline" clause. It reasoned that since the School Code requires a school board hearing in professional employee dismissals,[37] and since the

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34. *Neshaminy*, 501 Pa. at 547-50, 462 A.2d at 636-37.

35. The Pennsylvania Supreme Court stated that the causes for dismissal are controlled by the Public School Code because the Code mandates a hearing before the school board. *See* PA. STAT. ANN. tit. 24, §§ 11-1122, 11-1127. The court reasoned that "[a] valid dismissal of a tenured professional employee can be effected *only* if the school district acts in full compliance with these legislatively prescribed procedures. Thus, the Board could not properly agree to pursue dismissals by a non-statutory method." *Neshaminy*, 501 Pa. at 548, 462 A.2d at 636 (citations omitted, emphasis in original).

36. The supreme court recognized that the statutory dismissal standards and procedural requirements did not apply to temporary professional employees. However, the court incorrectly concluded that the School Code provided the professional employee with greater protection than was afforded a temporary professional employee. The court noted:

> The Code's substantive limitations on the range of grounds for dismissals, together with its mandated procedural safeguards, are to be recognized as emoluments of tenured professional status. No such limitations or procedures have been prescribed in the case of other classes of employees subject to dismissal.

*Id.* at 548, 462 A.2d at 636.

For criticism and analysis of the court's mistaken notion that its interpretation left professional employees with greater protection than temporary professional employees, see *infra* notes 176-189 and accompanying text.

37. In numerous other states a dismissal hearing is, unlike in Pennsylvania, explicitly at the option of the tenured teacher. *See, e.g.*, CAL. [EDUC.] CODE § 44934 (West Supp. 1983); DEL. CODE ANN. tit 14 § 1413 (Supp. 1982); FLA. STAT. ANN. § 231.36(6) (West Supp. 1983); MD. CODE ANN. § 6-202 (Supp. 1983); MASS. GEN. LAWS ANN. ch. 71, § 42 (West Supp. 1983-84); N.Y. [EDUC.] LAW § 3020-a(5) (McKinney 1983); OHIO REV. CODE ANN. § 3319.16 (Baldwin Supp. 1980); VT. STAT. ANN. tit. 16 §§ 563, 2004 (1983). New Jersey law provides that a tenured employee could be dismissed "only after a hearing." N.J. STAT. ANN. 18A:6-10 (West Supp. 1983-84).

In a case similar to *Neshaminy*, the Vermont Supreme Court held that a school board could lawfully agree to a "just cause" dismissal clause in the agreement. The court held that despite a statute that gave the school board sole power to hire and dismiss and that stated that such power could not be delegated, VT. STAT. ANN. tit. 16 § 563, the parties to the contract could submit dismissals to arbitration. Danville Bd. of School Directors v. Fifield, 132 Vt. 271, 315 A.2d 473 (1974).

In other states, courts have held that where an employee had the right to a hearing before being dismissed, he could instead utilize the grievance procedure if the contract so provided. *See* Public Employee Relations Comm. v. District School Bd., 374 So.2d 1005 (Fla.App. 1979); Sullivan v. Town of Belmont, 7 Mass. App. Ct. 214, 386 N.E.2d 1288 (1979); Board of Educ. v. Associated Teachers of Huntington, Inc., 30 N.Y.2d 122, 331 N.Y.S.2d 17, 282 N.E.2d 109 (1972).

parties agreed that the contract was not to supersede the School Code, they did not intend to include "dismissals" in the "discipline" clause.

In concluding that "dismissals" were not included within the "discipline" language, the court relied on its interpretation of section 703 of Act 195, which prohibits a contract provision from conflicting with the School Code.[38] Since the court held that the School Code hearing is the exclusive forum for the dismissal of professional employees, it reasoned that the arbitration of dismissals under a just cause discipline clause conflicted with the Code and thus violated Act 195. The court therefore concluded that arbitration of professional employee dismissals is illegal.[39]

Unfortunately, *Neshaminy* is inconsistent with other Pennsylvania Supreme Court decisions addressing the interrelationship between section 703 of Act 195 and the Public School Code, and section 903 of Act 195,[40] which mandates arbitration of grievances arising out of collective bargaining agreement provisions. An analysis of those cases will reveal that *Neshaminy* is irreconcilable with the other applicable decisions.

*2. Predecessors to Neshaminy.*—In *Board of Education of the School District of Philadelphia v. Philadelphia Federation of*

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New Jersey's courts have concluded that mandated statutory procedures for the review of disciplinary matters could not be changed or modified, such as by submitting a dispute to arbitration. *See* Dunnellen Bd. of Ed. v. Dunnellen Ed. Assn., 64 N.J. 17, 311 A.2d 737 (1973); City of Jersey City v. Jersey City Police Officers Ben. Assoc., 179 N.J. Super. 137, 430 A.2d 961 (1981).

38. Section 703 of Act 195 provides:

> The parties to the collective bargaining process shall not effect or implement a provision in the collective bargaining agreement if the implementation of that provision would be in violation of, or inconsistent with, or in conflict with any statute or statutes enacted by the General Assembly of the Commonwealth of Pennsylvania or the provisions of Municipal Home Rule Charters.

PA. STAT. ANN. tit. 43, § 1101.703 (Purdon Supp. 1983-84).

39. *Neshaminy*, 501 Pa. at 547-50, 462 A.2d at 636-37.

40. Section 903 of Act 195 provides:

> Arbitration of disputes or grievances arising out of the interpretation of the provisions of a collective bargaining agreement is mandatory. The procedure to be adopted is a proper subject of bargaining with the proviso that the final step shall provide for a binding decision by an arbitrator or a tri-partite board of arbitrators as the parties may agree. Any decisions of the arbitrator or arbitrators requiring legislation will only be effective if such legislation is enacted:
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> (1) If the parties cannot voluntarily agree upon the selection of an arbitrator, the parties shall notify the Bureau of Mediation of their inability to do so. The Bureau of Mediation shall then submit to the parties the names of seven arbitrators. Each party shall alternately strike a name until one name remains. The public employer shall strike the first name. The person remaining shall be the arbitrator.
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> (2) The costs of arbitration shall be shared equally by the parties. Fees paid to arbitrators shall be based on a schedule established by the Bureau of Mediation.

PA. STAT. ANN. tit. 43, § 1101.903 (Purdon Supp. 1983-84).

*Teachers Local No. 3, AFT, AFL-CIO*,[41] (*Philadelphia Federation of Teachers*), the supreme court held that a school district may agree in a collective bargaining agreement to submit the propriety of discharging a *non-tenured* teacher to arbitration.[42] The Board's unsuccessful argument[43] was nearly identical to the one that was accepted in *Neshaminy*. The Board alleged that the dismissal powers set forth in the Public School Code[44] were exclusive, and therefore any attempt to delegate those powers to an arbitrator would therefore violate section 703 of Act 195.[45] The court held that "[t]he mere fact that a particular subject matter may be covered by legislation does not remove it from collective bargaining. . . . Section 703 only prevents the agreement to and implementation of any term which would be in violation of or inconsistent with any statutory directive."[46] The court recognized that arbitration under Act 195 is not only favored, but mandatory,[47] and held that the dismissal of a

41. 464 Pa. 92, 346 A.2d 35 (1975).

42. *Id.* at 93, 346 A.2d at 36.

43. In the *Philadelphia Federation of Teachers* case, the school board sought to enjoin the arbitration of a temporary professional employee dismissal on the ground that an agreement to arbitrate such discharges was "an unlawful delegation of the exclusive power of the board." The Board contended that the provisions in the agreement illegally delegated powers conferred exclusively on the Board by sections 510, *see infra* note 115, and 514, *see infra* note 44, of the Public School Code. Thus, the Board maintained that the dismissal provisions of the contract were invalid under section 703 of Act 195. Philadelphia Fed'n of Teachers, 464 Pa. at 95-97, 346 A.2d at 37.

The Pennsylvania Supreme Court, relying on Pennsylvania Labor Relations Board v. State College Area School District, *see infra* notes 101-109 and accompanying text, held that the Board's power was not infringed by an agreement to arbitrate dismissals under a "just cause" standard. The court reasoned that Act 195 altered some of the Board's previously exclusive control by expressly requiring arbitration in all disputes.

44. The relevant School Code dismissal provisions for a temporary professional employee are in dispute. The majority in *Philadelphia Federation of Teachers* stated that section 514 of the School Code applied. That section provides:

> The Board of School Directors in any school district except as herein otherwise provided, shall after due notice, giving the reasons therefor, and after hearing if demanded, have the right at any time to remove any of its officers, employees, or appointees for incompetency, intemperance, neglect of duty, violation of any of the school laws of this Commonwealth, or other improper conduct.

PA. STAT. ANN. tit. 24, § 5-514 (Purdon Supp. 1983-84).

45. *See supra* note 38.

46. *Philadelphia Federation of Teachers*, 464 Pa. at 97, 346 A.2d at 38.

47. The Pennsylvania Supreme Court stated:

> It is not difficult to perceive the reasons for the statutory requirement that grievances be submitted to arbitration. If a dispute arises as to the interpretation or application of the agreement, there must be a mechanism for resolving the dispute or the agreement is meaningless. Historically, the primary means of resolving such disputes was the strike, and many agreements in the private sector retain this mechanism for at least some types of dispute. However, the resolution of all disputes by resort to economic force is costly to the parties, and more importantly, to the public. The General Assembly, therefore, chose to make the widely used procedure of labor arbitration mandatory under the [Public Employe Relations Act]. This brings the special expertise of labor arbitrators to bear on the often difficult problems of administering the collective bargaining agreement while assuring parties that their agreement will be effective and guaranteeing both parties and the public that such disputes will not disrupt peaceful

temporary professional employee was arbitrable.[48]

The issue of arbitrability under Act 195 of an employee dismissal arose in a non-school setting in *Pittsburgh Joint Collective Bargaining Committee v. City of Pittsburgh*[49] (*Pittsburgh*). In *Pittsburgh*, the supreme court's analysis fell short of determining whether inclusion of a dismissal provision[50] in the collective bargaining agreement conflicted with the Civil Service Act[51] and Act 195.[52] Rather, the court held that having agreed at the bargaining stage to submit dismissals to grievance arbitration, the employer thereafter could not avoid arbitration by alleging that the agreed upon provision conflicted with applicable statutes.[53] Thus, before *Neshaminy*, the court had indicated in *Pittsburgh* that it would not determine whether the arbitration of dismissals violated Act 195. The *Pittsburgh* decision implies that the question of illegality of a contract dismissal provision cannot be raised as a bar to arbitration under that provision because the public employer will be estopped from raising an illegality argument.

*3. The Law After Neshaminy.*—The present state of the law regarding dismissals under the Public School Code and Act 195 is now most unclear.[54] The *Neshaminy* court did not specifically over-

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labor relations or interrupt public services.

*Id.* at 100, 346 A.2d at 39.

48. The court did not address the specific issue whether a professional employee's dismissal was arbitrable. Nevertheless, it was widely accepted until *Neshaminy* that the same reasoning and policy factors required the same result with regard to tenured teachers. *See infra* note 172. Commentators believed that *Philadelphia Federation of Teachers* was the definitive statement with regard to the arbitration of all dismissals. *See* Comment, *A Power Shift in Public School Management*, *supra* note 1, at 815-16.

49. 481 Pa. 66, 391 A.2d 1318 (1978).

50. For a discussion of the disputed collective bargaining agreement provisions in *Pittsburgh*, see *id.* at 68-69, 391 A.2d at 1319.

51. Act of June 7, 1917, Pub. L. No. 609, § 1, PA. STAT. ANN. tit. 53, § 23401-23462 (Purdon Supp. 1983-84).

52. In rejecting the employer's argument that it could not agree to submit an employee dismissal to arbitration, the Pennsylvania Supreme Court concluded that:

> To permit an employer to enter into agreements and include terms such as grievance arbitration which raise the expectations of those concerned, and then to subsequently refuse to abide by those provisions on the basis of its lack of capacity would invite discord and distrust and create an atmosphere wherein a harmonious relationship would virtually be impossible to maintain.
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> Good faith bargaining would require that questions as to the legality of the proposed terms of a collective bargaining agreement should be resolved by the parties to the agreement at the bargaining stage.

481 Pa. at 74-75, 391 A.2d at 1322-23.

53. For a recent Pennsylvania Supreme Court case applying the same analysis and reasoning in estopping an employer from asserting an illegality argument, see Fraternal Order of Police v. Hickey, 499 Pa. 194, 452 A.2d 1005 (1982). The agreement between the city and the policemen's union provided that the Chief of Police was to be selected from within the ranks of the police force. The city subsequently attempted to hire an outsider and charged that the relevant provision was unenforceable because it was illegal. The court held the city to the provisions of the agreement on an estoppel theory.

54. The Pennsylvania School Boards' Association, Inc., however, has stated that the

rule either *Philadelphia Federation of Teachers* or *Pittsburgh*, although *Neshaminy* made reference to both cases.[55] An analysis of these three cases leads to several possible interpretations regarding dismissals.

The first possible interpretation is that the *Neshaminy* decision purports to declare that any dismissal clause in a collective bargaining agreement violates Act 195. On the other hand, *Pittsburgh* holds that regardless whether a dismissal clause conflicts with the statute, any party who agrees to arbitrate dismissals in a collective bargaining agreement is estopped from raising the illegality argument. Thus, where a contract presently contains a "just cause" *dismissal* clause, the *Neshaminy* decision should be irrelevant,[56] since the contract there at issue contained only a "just cause" *discipline* clause.[57]

Collective bargaining agreements, however, are not perpetual. Before expiration, the Board and the union begin to bargain for a successor agreement. Because of *Neshaminy*, a public employer should undoubtedly propose that a "just cause" dismissal clause be omitted from the new agreement due to illegality. Thus, while *Neshaminy* should not change the status of an existing agreement that contains a "just cause" dismissal clause due to the *Pittsburgh* decision,[58] it will have a heavy impact on future bargaining and deprive unions of bargaining leverage. If the parties nonetheless include a "just cause" dismissal provision in the contract, any attempt to prevent its enforcement should be estopped, based on the *Pittsburgh* rationale.

The second possible interpretation rests upon the *Neshaminy* parties' negotiation of a provision that "nothing [in the agreement] shall supersede . . . applicable laws."[59] Since the parties thereby

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*Neshaminy* decision "is clear as to its impact on dismissal actions," i.e., any dismissal under the Public School Code is not arbitrable. Not surprisingly, the School Boards' Association hails *Neshaminy* as an excellent decision. Its statement that *Neshaminy* is clear as to dismissals is no doubt merely a note of optimism on its part, both that the law is now clear and that it provides school boards with more power and less restrictions. *See Dismissal of Professional Employees: School Code and Just Cause, Employee Relations Guidelines*, Vol. XIII, No. 17 (July 26, 1983).

55. *See Neshaminy*, 501 Pa. at 539-40, 462 A.2d at 632. The *Neshaminy* court admitted that the policy in this Commonwealth "not only favors but mandates the submission to arbitration of public employee grievances," and cited *Philadelphia Federation of Teachers* as one of its authorities. *Id. Neshaminy* cites *Pittsburgh* as authoritative of the well-settled principle that it is the arbitrator who must determine the issue of the scope of grievance arbitration. *Id.*

56. The decision would not be irrelevant to the extent that it is now valid law. Any time a contract contains a dismissal clause, however, the employer should be estopped from raising the *Neshaminy* illegality argument. Thus, so long as the contract provided for arbitration of professional employee dismissals, the *Neshaminy* decision should not come into play.

57. *See supra* note 12 and accompanying text.

58. *See supra* note 49-53 and accompanying text.

59. 501 Pa. at 541, 462 A.2d at 632-33. See *supra* note 12 for full text of this provision. Most collective bargaining agreements between teachers' unions and school districts do not contain language like the "superseding" clause in *Neshaminy*. Instead, most so called "statu-

clearly indicated that the collective bargaining agreement was not to supersede the School Code or Act 195, a dismissal provision included in the collective bargaining agreement would be illegal, and an estoppel theory would not apply. This interpretation relies on the intent of the parties not to supersede relevant statutes (despite an obvious intent of the parties to arbitrate dismissals, manifested by their agreement to do so in the collective bargaining agreement).[60] Under this interpretation, however, a collective bargaining agreement that does not clearly indicate that no provision is to supersede applicable law[61] should be permitted to include a dismissal provision, and any attempt to prevent enforcement of the provision should be estopped, based on the reasoning in *Pittsburgh*.[62]

The third possible interpretation begins with the assumption that under *Neshaminy*, tenured teachers may not take their dismissals to arbitration unless they can successfully advance an estoppel theory, and must instead rely on the School Code procedures.[63] Dismissed non-tenured teachers may still go through arbitration, based on the court's decision in *Philadelphia Federation of Teachers*. The relevant distinction between School Code dismissal procedures for tenured teachers and those for nontenured teachers is that a tenured teacher facing dismissal gets an automatic hearing before the school board, while a hearing for a nontenured teacher is at the option of the dismissed employee.[64] Under Local Agency Law, which is applicable to temporary professional employees, no adjudication is valid unless the affected employee has been afforded a hearing.[65] This implies a mandatory hearing, thus blurring the procedural distinction between dismissals of tenured and nontenured teachers. Nevertheless, the existence of a hearing mandated by the School Code for

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tory savings clauses" are worded differently and purport to preserve for the employee the rights of applicable law. In other words, typical statutory savings clauses are worded to *expand* the employee's rights rather than to limit them. The following is a model "statutory savings clause" which is recommended by PSEA negotiators to local associations:

> Nothing contained herein shall be construed to deny or restrict to any employee such rights as may exist under the Public School Code of 1949 as amended, or other applicable laws and regulations. The rights granted to employees hereunder shall be deemed to be in addition to those provided elsewhere.

PSEA Staff, *Collective Bargaining Reference Manual* 35 (1979).

60. *See infra* notes 163-175 and accompanying text.

61. This interpretation is more reasonable when dealing with a "discipline" clause modified by a "not-to-supersede-applicable-law" clause, than when interpreting a "dismissal" clause similarly modified. It is unreasonable to hold that an expressed "dismissal" clause is illegal on the basis of a superseding clause. This would allow parties to agree to any provision, however questionable, at the bargaining stage, and fight out the legality of the terms in court, so long as a "not-to-supersede-applicable-law" provision was included in the contract.

62. *See supra* notes 49-53 and accompanying text.

63. *See supra* note 28.

64. Compare the procedure for dismissal of a professional employee, *supra* note 28 *with* the procedure for a temporary professional employee dismissal, *supra* note 44.

65. Act of April 28, 1978, Pub. L. 202 No. 53, PA. CONS. STAT. ANN. tit. 2 § 553 (Purdon Supp. 1983-84). *See also infra* note 99 (11).

professional employees is the only logical distinction between the dismissal standards.

These three possible interpretations present several difficult problems. As a fundamental rule in the arbitration of contract provisions, the factfinder should attempt to discern the intent of the parties.[66] First, the factfinder may reasonably conclude that a bargained-for just cause *discipline* provision, when read in conjunction with a "not-to-supersede-applicable-law"[67] provision, does not include dismissals, particularly in light of *Neshaminy*.[68]

Second, if the contract expressly includes a just cause *dismissal* provision *and* a "not-to-supersede-applicable-law" provision, it is unreasonable to conclude that the parties did *not* intend that dismissals be arbitrated.[69] To prevent estoppel, the parties to the contract must have confronted the question of the legality of collective bargaining

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66. In arbitration, a basic principle of construction of written agreements requires that the arbitrator attempt to ascertain and effectuate the intent of the parties. One of the leading works on arbitration has summarized this premise:

> The collective agreement should be construed, not narrowly and technically, but broadly and so as to accomplish its evident aims.
>
> In determining the intent of the parties, inquiry is made as to what the language meant to the parties when the agreement was written. It is this meaning that governs, not the meaning that can be possibly read into the language.
>
> The "intent of the parties" rule has been elaborated as follows:
>
> "[I]f the intention of the parties can be clearly discovered, the court will give effect to it and construe the words accordingly. . . . It is not within the function of the judiciary to look outside of the instrument to get at the intention of the parties and then carry out that intention regardless of whether the instrument contains language sufficient to express it; but their sole duty is to find out what was meant by the language of the instrument. This language must be sufficient, when looked at in the light of such facts as the court is entitled to consider, to sustain whatever effect is given to the instrument."

F. ELKOURI AND E. ELKOURI, HOW ARBITRATION WORKS, 302-03, (3d. ed. 1973) (*quoting* 12 AM. JUR. § 227 at 746-48) (footnotes omitted) [hereinafter referred to as ELKOURI].

67. In *Neshaminy*, the court emphasized that the parties explicitly agreed not to supersede relevant School Code provisions. The court stated that since

> [t]he Code does not employ the term "discipline," nor does it attempt to establish standards for its imposition, . . . the use of the term "discipline" in the Agreement, consistent with the Agreement's stated intention of not superseding the Code, would appear to refer to actions other than "termination of contract," "dismissal" and/or "discharge," which are specifically provided for in the Code.

501 Pa. at 543, 462 A.2d at 633-34.

Whether a less restrictive statutory savings clause, *see, e.g., supra* note 59, would have the same effect on a bargained-for "just cause" discipline provision is uncertain. Presumably, a more liberal statutory savings clause will at least allow an employee to successfully advance an estoppel theory because (1) the traditional statutory savings provision expands the rights of employees, rather than limit them, and (2) under the more traditional provision, dismissals have been arbitrated for several years.

68. Parties to contract negotiations will consider *Neshaminy* when they sit down at the bargaining table. If the parties now expressly agree that their contract is not to supersede applicable law, and explicitly negotiate a just cause discipline clause, they obviously do not intend to have dismissals arbitrated.

Parties who are bound by contracts that presently include the two abovementioned clauses will apparently be bound by *Neshaminy*. This, however, is not necessarily what the parties intended when negotiating the collective bargaining agreement. *See infra* notes 163-175 and accompanying text.

69. *See supra* note 52; *see also infra* notes 172-175 and accompanying text.

agreement terms at the bargaining stage.[70] One cannot bargain for terms and then later challenge their legality.[71] Parties and courts cannot reasonably contend that the mere inclusion of a "not-to-supersede-applicable-law" provision raises the question of the legality of all terms expressly included in the collective bargaining agreement.[72] Nevertheless, this is precisely what the supreme court did in *Neshaminy*, indicating that parties can bargain for any terms, legal or otherwise, and avoid future application of an estoppel theory by simply including a "not-to-supersede-applicable-law" clause. If under *Neshaminy* the parties need not challenge the legality of terms at the bargaining stage, then unethical and fraudulent bargaining can certainly result.

A third problem arises when a collective bargaining agreement contains a just cause discipline provision, but not a just cause dismissal clause, and does not contain a "not-to-supersede-applicable-law" provision. The court in *Neshaminy* gave great emphasis to the "not-to-supersede" provision.[73] Therefore, dismissals under a collective bargaining agreement that lacks a "not-to-supersede" provision should be arbitrable,[74] so long as other indicia of the parties intent do not demonstrate that they did not intend to include dismissals within the just cause discipline provision.[75]

To illustrate the confusion that *Neshaminy* has now created, the chart below categorizes the possible outcomes of various collective bargaining agreement provisions when a professional employee is dismissed.

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70. *See supra* note 52; *see also infra* notes 172-175 and accompanying text.

71. *See supra* note 52; *see also infra* notes 172-175 and accompanying text.

72. *See supra* note 52; *see also infra* notes 172-175 and accompanying text. In *Pittsburgh*, the Pennsylvania Supreme Court rejected the illegality argument because the parties had not challenged the legality of terms at the bargaining stage. 381 Pa. at 75, 391 A.2d at 1322-23. The court neither stated nor implied that the parties could substitute a "not-to-supersede-applicable-law" provision for the good faith questioning of the legality of specific terms at the bargaining stage. Indeed, to allow all terms in the agreement to be included subject to advance warning that their legality may later be questioned "would invite distrust and create an atmosphere wherein a harmonious relationship would virtually be impossible to maintain." *Id.* at 74, 391 A.2d at 1322. An employer could agree to grant some benefit to the employees, knowing such benefit to be illegal, in exchange for a concession from the employees' union. After having received the benefits of the concession, the employer could then have the benefit struck down under the logic of *Neshaminy*, because the legality of the term was questioned by the mere inclusion of the "not-to-supersede-applicable-law" provision.

73. *See supra* notes 12, 67 and accompanying text.

74. Dismissals are, in fact, the ultimate form of discipline. *See infra* notes 164-171 and accompanying text.

75. Under Ludwig-Honold Manufacturing Co. v. Fletcher, 405 F.2d 1123 (3d Cir. 1969), *see infra* notes 154-171 and accompanying text, the "essence test" was modified to look at all relevant indicia of the parties intent. This is consistent with the contract doctrine that the law will attempt to interpret a contract as the parties intended. *See supra* note 66 and accompanying text. An obvious example of where the indicia of parties intent would indicate that dismissals were not to be included under a discipline clause would be where there was a separate clause dealing with the procedures for dismissals.

| Type of Just Cause Provision Being Interpreted | Does the Agreement Contain a "Not-To-Supersede-Applicable-Law" Provision? | In the Dismissal Arbitrable? |
|---|---|---|
| Dismissal | No | Yes (*Pittsburgh*)[76] |
| Discipline | Yes | No (*Neshaminy*)[77] |
| Dismissal | Yes | ? (?)[78] |
| Discipline | No | ? (?)[79] |

*4. The Inequitable Legacy of Neshaminy.*—After *Neshaminy*, protection from wrongful discharges for nontenured teachers whose collective bargaining agreement contains a just cause discipline provision is now in fact greater than the protection afforded tenured teachers.[80] Under the *Philadelphia Federation of Teachers* rationale, nontenured teachers may take their allegedly wrongful discharges to arbitration *or* to school board hearings[81] or possibly both,[82] while under the *Neshaminy* rule, tenured teachers

76. *See supra* notes 49-53 and accompanying text.

77. *See supra* notes 34-40 and accompanying text.

78. If *Neshaminy* is read broadly to conclude that the court meant its decision to apply to all tenured teacher dismissals, then a dismissal is probably only arbitrable if an estoppel theory may apply. *But see supra* notes 69-72 and accompanying text.

79. Under the *Neshaminy* rationale, dismissals may not be arbitrable because arbitrating dismissals would supersede the School Code and Act 195. Nevertheless, dismissals should be arbitrable if it is not shown that the parties intended otherwise, because a dismissal is a form of discipline, *see infra* notes 164-171 and accompanying text, and the parties should be estopped from asserting that the terms are illegal, based on the *Pittsburgh* decision. *See supra* notes 49-64, 73-75 and accompanying text.

80. The purpose of the Teacher's Tenure Act, PA. STAT. ANN. tit. 24, §§ 11-1121-11-1132, is to maintain an "adequate and competent teaching staff, free from political and personal arbitrary interference, *whereby capable and competent teachers might feel secure and more efficiently perform their duty of instruction.* . . ." Sporie v. Eastern Westmoreland Area Vo-Tech School, 47 Pa. Commw. 390, 394, 408 A.2d 888, 891 (1979) (quoting Ehret v. Kulpmont Borough School Dist., 333 Pa. 518, 524-25, 5 A.2d 188, 191-92 (1939)) (emphasis added). Thus, having earned the status of tenure, an employee should be better protected from arbitrary employer action than a nontenured teacher. The underlying premise is akin to a probationary employment. A school district should have more discretion in dismissing temporary professional employees than a teacher who has qualified for tenured status.

81. *See Philadelphia Federation of Teachers*, 464 Pa. at 93-102, 346 A.2d at 36-40.

82. In West Middlesex Area School Dist. v. Commonwealth, PLRB, 55 Pa. Commw. 404, 423 A.2d 78 (1980) the Commonwealth Court held that a professional employee could have his *demotion* reviewed via School Code procedures *and* grievance procedures. If this rationale is broadly applied, nontenured teachers upon dismissal may be able to proceed to both arbitration and School Code hearings. The court in *West Middlesex* concluded:

> The remedy provided to a professional employee threatened with demotion by Section 1151 of the Public School Code . . . tests only whether the proposed demotion action is arbitrary or based on improper motives. . . .
>
> The grievance and arbitration procedure provided by the collective bargaining agreement on the other hand searches whether the school board's action was for just cause. . . .
>
> Since the substantive issues under the remedy provided by the bargaining agreement on the one hand and by Section 1151 of the Public School Code . . . on the other are different, DeLise's *resort to grievance and arbitration* after attending the school board's Section 1151 hearing *was not the pursuit of an inconsis-*

may use only the statutory procedures prescribed by the School Code.[83] Furthermore, school boards cannot provide the employee with a totally unbiased[84] hearing; arbitrators as a matter of practice are more able to give employees a fair and impartial review.[85] Thus, the treatment is inequitably unbalanced, favoring nontenured teachers over tenured teachers. Given the choice of forums (arbitration or school board hearings), it is not surprising that an employee would elect arbitration.[86] Since *Neshaminy* has denied the tenured teacher this choice, nontenured teachers now have greater leverage and potentially greater rights. This surely cannot be what the legislature intended by requiring a hearing in professional employee dismissal cases.[87] By enacting teacher tenure laws, the General Assembly sought to provide the tenured teacher with greater protection than nontenured teachers[88] from arbitrary dismissals. *Neshaminy* contradicts this legislative intent, and frustrates the entire purpose of teacher tenure.

### *C. The Law After Neshaminy With Respect To Demotions And Suspensions*

In addition to creating confusion for tenured teachers who are dismissed, *Neshaminy* also significantly affects the arbitrability of

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*tent remedy.*

*Id.* at 409, 423 A.2d at 784 (citations and footnote omitted, emphasis added).

83. *See supra* note 28.

84. The Pennsylvania Supreme Court has concluded that although School Code dismissal provisions do not violate Constitutional due process rights, *c.f.* Barndt v. Wissahickon School Dist., 475 F. Supp. 503 (E.D. Pa. 1979), *aff'd* 615 F.2d 1352, *cert. denied* 449 U.S. 831 (1980), a school board hearing cannot be completely unbiased. "At the hearing the board plays a dual role. It acts as both prosecutor and as judge, and because of this it can never be totally unbiased." *Philadelphia Federation of Teachers*, 464 Pa. at 104, 346 A.2d at 41, (quoting Brentwood Borough School Dist. Appeal, 439 Pa. 256, 262, 267 A.2d 848, 851 (1970)).

85. *See infra* note 125.

86. The permissible reasons for dismissing an employee are not limited by taking a dismissal to arbitration. Where there are statutory grounds, *e.g.*, PA. STAT. ANN. tit. 24, § 11-1122 (Purdon Supp. 1983-84), the "just cause" standard will be interpreted as the identical statutory grounds or those grounds *plus others*. In *Neshaminy*, for example, the arbitrator would have applied the statutory "immorality" standard or the immorality standard *plus others*. *See also infra* note 125 and accompanying text.

87. By providing for mandatory review of dismissals in section 11-1127 of the School Code, the legislature no doubt intended to provide more protection for employees who are discharged unfairly or arbitrarily than employees who are merely demoted or suspended. It is therefore anomolous that dismissed employees, having to proceed through a statutory school board hearing, get less protection than employees faced with demotion or suspension. Both conceptually and in practice, an arbitrator treats an employee better than the statutory process.

A contrary legislative intent would encourage school districts to dismiss employees in border-line cases, rather than discipline them, because the review is more limited. *See also supra* note 79 and accompanying text.

88. By definition, the purpose in enacting a teacher tenure law is to provide certain protections to employees who achieve the status of tenure that are unavailable to nontenured employees. *See also supra* notes 79, 87 and accompanying text.

other employer conduct. As noted above, just cause dismissal clauses for nontenured teachers are still valid since *Neshaminy* did not overrule *Philadelphia Federation of Teachers*. Nevertheless, *Neshaminy* raises additional questions whether other employer actions are arbitrable. Specifically, questions arise as to the implications of *Neshaminy* with respect to the arbitration of demotions, disciplinary actions, and suspensions.

*1. Demotions.*—In *Neshaminy* the court stated that demotions[89] of tenured teachers are still arbitrable because (1) the hearing is at the *option* of the professional employee, rather than statutorily mandated, and (2) no statutory grounds are set forth for demotions, while grounds are set forth for dismissals.[90] Thus, "including demotions among the subjects of mandatory arbitration would not supersede or contravene any standard or procedure mandated by the Code."[91] This clear statement raises the question whether the critical factor in the court's analysis is the existence of a statutorily mandated hearing or statutorily prescribed reasons[92] for the employer action or both.

*2. Suspensions.*—Apparently, *Neshaminy* does not overrule *Rylke v. Portage Area School District* (*Rylke*).[93] The supreme court in *Rylke* held that Act 195 did not prohibit arbitration of a dispute arising from an employee's suspension. In contrast to the *Neshaminy* dismissal context, the Public School Code[94] does not mandate that disputes arising out of the suspension of professional employees be resolved exclusively by a hearing before the Board of School Directors. In discussing demotions, the supreme court in *Neshaminy* stated that there is no mandatory hearing for demotions, in contrast to dismissal procedures, thereby implying the importance placed on the mandatory nature of the proceedings. But under Local Agency Law,[95] a suspended teacher must be afforded a hearing before a final determination by a school board is valid. Thus, while neither the School Code nor Local Agency Law requires a hearing before a suspension, a suspended teacher is entitled to a hearing under Local Agency Law. In discussing the procedural differences between dismissals and demotions, the court cited its opinion in *Rylke* with ap-

89. Standards and procedures for professional employee demotions are covered by section 11-1151 of the School Code. PA. STAT. ANN. tit. 24, § 11-1151 (Purdon Supp. 1983-84).

90. Standards for professional employee dismissals are contained in section 11-1122 of the School Code. *See supra* note 29.

91. *Neshaminy*, 501 Pa. at 544, 462 A.2d at 634.

92. *See supra* note 86.

93. 473 Pa. 481, 375 A.2d 692 (1977).

94. *See* PA. STAT. ANN. tit. 24, §§ 1124-1125.1.

95. PA. CONS. STAT. ANN. tit. 2 § 553 (Purdon Supp. 1983-84).

proval.[96] Thus, suspensions must remain arbitrable, and the critical factor in determining whether a dispute is arbitrable is the existence of statutorily mandated procedures[97] for a hearing.[98]

96. *Neshaminy*, 501 Pa. at 544, 462 A.2d at 634.

97. Specific statutory standards for suspensions are set forth in the School Code, while procedural requirements are not. The court, in citing *Rylke*, implied that the existence of statutory standards alone will not bar the parties from arbitrating the dispute. *Id.*

98. The following chart sets forth the factual permutations controlling the arbitrability of various employer actions.

| Type of Employer Action | Are Reasons For Employer Action Specified in the School Code? | Is a School Board Hearing Mandated by the Code? | Is The Dispute Arbitrable? |
|---|---|---|---|
| Dismissal (Tenured) | Yes (1) | Yes (2) | No (3) |
| Dismissal (Nontenured) | Yes (4) | No (5) | Yes (6) |
| Demotion | No (7) | No (8) | Yes (9) |
| Suspension | Yes (10) | No (11) | Yes (12) |
| Discipline | No (13) | No (14) | Yes (15) |

(1) *See* PA. STAT ANN. tit. 24, § 11-1122, *supra* note 29.

(2) *See* PA. STAT ANN. tit. 24, § 11-1127, *supra* note 28. Section 1127 of the School Code provides that for dismissal to be valid, the board "shall conduct a hearing." The *Neshaminy* court interpreted this as statutorily mandating a hearing which cannot be waived by the parties. *See Neshaminy*, 501 Pa. at 547-48, 462 A.2d at 636. Nevertheless, requiring a school board hearing does not automatically bar arbitration. It is possible that an employee could have his dismissal reviewed in both forums. Pennsylvania courts have recognized this in matters of demotions. See *supra* note 82 and accompany text for discussion of the Pennsylvania Supreme Court decision in *West Middlesex*. Thus, mandating a school board hearing does not necessarily mean that it is the exclusive forum for review.

(3) *See Neshaminy*, 501 Pa. at 547-50, 462 A.2d at 636-37.

(4) *See* PA. STAT. ANN. tit. 24 §§ 5-514, 11-1108. The supreme court held in *Philadelphia Federation of Teachers* that the relevant section for a temporary professional employee's dismissal was § 514. *See supra* note 44. Nevertheless, as the dissent in *Philadelphia Federation of Teachers* noted, § 1108 provides a clearer and more definite statement of the allowable causes for dismissal of a temporary professional employee. That section provides in part that "[no] temporary professional employee shall be dismissed unless rated unsatisfactory, and notification, in writing, of such unsatisfactory rating shall have been furnished the employee within ten (10) days following date of such rating."

(5) *See supra* notes 63-65 and accompanying text.

(6) *Id.*

(7) *See* PA. STAT. ANN. tit. 24, § 11-1151 (Purdon Supp. 1983- 84). Section 1151 provides in part:

> There shall be no demotion of any professional employee either in salary or type of position, except as otherwise provided in this Act, without the consent of the employee, or, if such consent is not received, then such demotion shall be subject to the right of a hearing before the Board of School Directors and an appeal in the same manner as hereinbefore provided in the case of a dismissal of a professional employee.

For appeal procedures, see *supra* § 11-1131 at note 28.

(8) *Id.*

(9) *See supra* notes 89-92 and accompanying text.

(10) *See* PA. STAT. ANN. tit. 24, § 11-1124 (Purdon Supp. 1983-84). Section 1124 provides in pertinent part:

> Any Board of School Directors may suspend the necessary number of professional employees for any of the causes hereinafter enumerated:
> 1) Substantial decrease in pupil enrollment in the school district;
> 2) Curtailment or alteration of the educational program on recommendation of

*3. The Better Legal Trend—Neshaminy Or Its Predecessors?*[99]—A reading of cases interpreting section 703 of Act 195 and the language of sections 1126-1132 of the School Code reveals that it was not reasonable for the *Neshaminy* court to conclude that the school board hearing is the exclusive forum for review of dismissals.[100] In *Pennsylvania Labor Relations Board v. State College Area School District* (*State College*)[101] the Pennsylvania Supreme Court held that "the mere fact that a particular subject matter may be covered by legislation does not remove it from collective bargaining. . . ."[102] The court concluded that an issue is only excluded from bargaining if "statutory provisions *explicitly and definitively* prohibit the public employer from making an agreement as to that specific term or condition of employment."[103] The School Code does not "*explicitly and definitively*" prohibit a school district from agreeing to arbitrate dismissals: it merely insures Board review of an employee's dismissal. Just as an employee's union can bargain for a higher salary than the minimum prescribed by law or other benefits that are greater than those prescribed by statute, a professional employee should have the opportunity to bargain for the arbitration of dismissals. Accordingly, a professional employee should be able to have his dismissal reviewed by a school board, or an arbitrator, or

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the superintendent, concurred in by the Board of School Directors, approved by the Department of Public Instruction. . .;

3) Consolidation of schools. . .;

4) When new school districts are established as the result of reorganization of school districts. . .;

(11) No School Code provision requires a hearing before suspension. However, under Local Agency Law, a suspended teacher is to be afforded reasonable notice of a hearing and the opportunity to be heard before the suspension can be valid. PA. CONS. STAT. ANN. tit. 2, § 553 (Purdon Supp. 1983-84). *See* Sto-Rox School Dist. v. Horgan, 68 Pa. Commw. 416, 449 A.2d 796 (1982); Eastern York School Dist. v. Long, 46 Pa. Commw. 209, 407 A.2d 69 (1979), *aff'd.* 494 Pa. 105, 430 A.2d 267.

(12) *See Neshaminy*, 501 Pa. at 544, 462 A.2d at 634; Rylke v. Portage Area School Dist., *supra* notes 93-98 and accompanying text.

(13) Section 510 of the School Code permits a school district to adopt reasonable rules and regulations governing school affairs and the conduct of employees while they are engaged in their duties. However, no standards or reasons permissible for discipline are prescribed by this section. *See* PA. STAT. ANN. tit. 24, § 5-510 (Purdon Supp. 1983-84).

(14) Section 510 does not prescribe procedures to be employed in the disciplinary process. *See id.* Such discipline, however, is controlled also by Local Agency Law, which grants a disciplined employee a right to a hearing. *See supra* note 98(11).

(15) In *Neshaminy*, the court indicated that a just cause discipline clause was valid and may be the subject of arbitration because neither standards nor procedures for review were provided in the School Code. *See Neshaminy*, 501 Pa. at 544-46, 462 A.2d at 634-35.

99. *See Philadelphia Federation of Teachers*, *supra* notes 38-48 and accompanying text; *Pittsburgh*, *supra* notes 49-53 and accompanying text; *Rylke*, *supra* notes 93-98 and accompanying text.

100. *See Neshaminy*, 501 Pa. at 545-50, 462 A.2d at 634-37.

101. 461 Pa. 494, 337 A.2d 262 (1975).

102. *Id.* at 508, 337 A.2d at 269.

103. *Id.* at 510, 337 A.2d at 270 (emphasis added).

both.[104] This interpretation would be consistent with the *State College* decision as well as the purpose of Act 195.[105]

*Neshaminy* is the first case in which the supreme court held that such a collective bargaining agreement provision violated or was inconsistent with section 703 of Act 195. In *State College*, the court could have justifiably set forth a broader standard for determining whether section 703 was violated by holding that parties could not bargain for terms of employment which were already covered by statute. The *State College* majority, however, recognized that such an interpretation would conflict with the purpose of Act 195[106] and merely serve to "further define the distinction between the inherent managerial prerogative concept set forth in section 702. . . ."[107]

After the *State College* decision and until *Neshaminy*, the supreme court adopted a hands-off position: only in rare circumstances would it declare collective bargaining agreement provisions illegal. It was asked on numerous occasions to find that a collective bargaining agreement provision was inconsistent with the School Code and Act 195.[108]In nearly every case, however, the court applied the *State College* rationale and rejected the argument.[109] *Neshaminy* is a landmark decision in Act 195 litigation, being inconsistent with the interpretation of section 703 that the court had been applying since *State College*.

In addition to reversing established precedents, which provided the employee with more protection,[110] *Neshaminy's* inconsistent application of section 703 yields a result violative of public policy.

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104. *See supra* note 82.

105. *See supra* note 80. In *State College*, the court reasoned that "the passage of Act 195 . . . expresses a manifest intention to create a sufficiently vital collective bargaining process capable of meeting the need to restore harmony within the public sector." *Id.* at 505, 337 A.2d at 267.

In passing Act 195, the General Assembly stated that:

> It is the public policy of this Commonwealth and the purpose of this act to promote orderly and constructive relationships between all public employers and their employees . . . [T]he General Assembly has determined that the overall policy may best be accomplished by . . . (2) requiring public employers to negotiate and bargain. . . .

PA. STAT ANN. tit. 43, § 1101.101 (Purdon Supp. 1983-84).

106. *Cf. West Middlesex*, *supra* note 82; *State College*, 461 Pa. at 505-506, 337 A.2d at 267.

107. 461 Pa. at 509, 337 A.2d at 269.

108. *See, e.g., Philadelphia Federation of Teachers*, *supra* note 41; *Pittsburgh*, *supra* note 49; Millberry v. Board of Ed., 467 Pa. 79, 354 A.2d 559 (1976); Scranton Federation of Teachers v. Scranton School Dist., 45 Pa. Commw. 385, 407 A.2d 61 (1979), *appeal dismissed*, 497 Pa. 346, 440 A.2d 1190 (1982); AFSCME v. City of Reading, 66 Pa. Commw. 539, 445 A.2d 570 (1982).

109. *See supra* note 108 and cases cited therein; *Rylke*, *supra* note 93. *But see* Cumberland Valley Educ. Ass'n. v. Cumberland Valley School Dist., 24 Pa. Commw. 167, 354 A.2d 265 (1976) (Sabbatical leave provisions in collective bargaining agreement providing for, *inter alia*, full pay for teachers v. sabbatical conflicted with School Code sabbatical leave provisions).

110. *See supra* notes 80-89 and accompanying text.

When all the supreme court decisions are read together, the lowest classified teachers[111] (temporary professional employees) and the least serious employer actions (demotions) trigger the strongest employee protections. This result is untenable: it clearly is not within the intent of the legislature and violates the philosophy of tenure, which is to protect teachers who have attained certain seniority[112] from arbitrary employer actions, including dismissals.[113]

## III. Proposed Strategies After *Neshaminy*

### *A. The Long Run—Amending The School Code*[114]

The General Assembly could take several routes to soften *Neshaminy's* blow, and in turn, return to tenured teachers a fairer system of review of alleged employer abuses. Three proposals will be discussed, each of which would provide an equitable system of justice for tenured teachers, while taking nothing away from the school district's right to manage its own affairs.[115]

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111. "Substitute teachers" are actually classified lower than "temporary professional employees," PA. STAT. ANN. tit. 24, § 11-1101(2), but in this comment any discussion of substitute teachers has been omitted. Substitute teachers do not share similar rights with professional employees and temporary professional employees; in this comment, temporary professional employees are referred to as the lowest classified teachers for School Code protection purposes.

112. The requirements for acquiring tenure are discussed in part in Section 11-1108 of the School Code, which provides in part:

> A temporary professional employee whose work has been certified by the district superintendent to the secretary of the school district, during the last four (4) months of the second year of such service, as being satisfactory shall thereafter be a "professional employee" within the meaning of this article. . . .

PA. STAT. ANN. tit 24, § 11-1108(b) (Purdon Aupp. 1983-84).

113. *See supra* note 80.

114. At least one union lawyer indicated that she believed the supreme court may limit *Neshaminy* if asked to review another professional employee dismissal with facts not so overwhelmingly against the teacher. Telephone Interview with Catherine C. O'Toole, former Staff Attorney for PSEA (present General Counsel for the Washington [State] Education Association) (October 14, 1983). Nevertheless, *Neshaminy* was a unanimous decision and the court will probably not modify its decision in the near future. It is therefore incumbent on the state legislature to implement any change in the *Neshaminy* result.

115. Section 510 of the Public School Code and section 702 of Act 195 guarantee the district considerable discretion in managing its affairs. Section 510 of the School Code provides in part:

> The Board of School Directors in any school district may adopt and enforce such reasonable rules and regulations as it may deem necessary and proper, regarding the management of its school affairs and the conduct and deportment of all . . . teachers . . . during the time they are engaged in their duties to the district. . . .

PA. STAT. ANN. tit. 24, § 5-510 (Purdon Supp. 1983-84).

Additionally, in the bargaining area, certain matters are not subject to bargaining. Section 702 of Act 195 provides in part:

> Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure, and selection and direction of personnel. . . .

A School Code amendment that would change a school board hearing in dismissal cases from a statutory mandate to an option of the dismissed employee is one obvious solution.[116] Such an amendment would upgrade the employee's rights in dismissal cases to a level equal to demotions and suspensions,[117] so that the dismissed tenured teacher would have the option of having his dismissal arbitrated, or proceeding with a school board hearing. For many years an employee was required to request a school board hearing[118] before he received one. The change in status of the hearing from optional to mandatory evolved to ensure that the employee's dismissal was being reviewed, rather than to prevent the employee from arbitrating his dismissal.[119] Thus, while the legislature intended to provide more protection for the tenured teacher,[120] the hearing requirement has instead created a system of minimal protection[121] for severe employer actions. Removing the requirement of a school board hearing would return teacher protection from unfair dismissals to its previous intended levels of protection.

A second solution is the recently proposed Hearing Examiner's Bill,[122] which amends section 11-1127 of the School Code[123] and of-

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PA. STAT. ANN. tit. 43, § 1101.702 (Purdon Supp. 1983-84).

116. As of the date of this writing, legislators are considering the introduction of an "Arbitration of Dismissals Bill," which would merely reverse the *Neshaminy* decision and allow dismissals to be arbitrated. The first proposal in this comment does not differ significantly in form to such a bill, and would not differ at all in result.

117. *See supra* notes 89-97 and accompanying text.

118. Under the Tenure Law of 1937, a teacher who acquired tenure could have a hearing upon dismissal, but only if he or she requested it. The former law provided in part:

> Before any professional employee is dismissed . . . the school district shall furnish such professional employee with a detailed written statement of the charges upon which his or her dismissal . . . is based . . . [and] *such professional employee will be given an opportunity to be heard* either in person or by counsel or both before the board of school directors. . . .

Act of April 6, 1937, Pub. L. 213, § 2, *quoted in* 21 PA. LEGIS. J. 2180 (1937) (emphasis added).

The School Code enacted in 1949 altered the language so as to indicate that the board "shall conduct a hearing." PA. STAT. ANN. tit. 24, § 11-1127 (Purdon Supp. 1983-84).

119. In 1949, when the School Code dismissal provisions were drafted, arbitration was not a method for adjudicating public employee labor disputes. It is probable that the General Assembly did not even consider that mandating a school board hearing would have the effect of preventing grievance arbitration. Act 195, which favors arbitration, was not enacted until 1970. Thus, it is not logical to presume that the legislature intended to prevent an employee from arbitrating his dismissal by mandating a school board hearing.

120. One can infer from the legislature's changing of the school board hearing from a right, *see supra* note 119, to a requirement, that the legislature meant to provide additional insurance that the professional employee would not be arbitrarily dismissed. At that time, a school board hearing must have seemed to the legislature to be fair and adequate.

With the enactment of Act 195, however, the General Assembly apparently recognized defects in many public employee procedural provisions, and thus created mandatory arbitration. The *Neshaminy* decision obviates the intent of Act 195, and assumes that the legislature intended that dismissals not be arbitrable, even if circumstances changed. *See also supra* note 80 and accompanying text.

121. *See supra* notes 110-113 and accompanying text.

122. S. 519, 1983 Sess. § 3 (March 18, 1983).

123. *See supra* note 28.

fers an alternative forum for the review of dismissal actions that is separate from either the arbitrator or the school board.[124] Employers often perceive arbitrators as having a pro-employee bias,[125] and the neutral hearing examiner would provide what the name implies: a neutral person chosen by the Secretary of Education to examine and rule on the propriety of the dismissal. Review by the hearing examiner would also be at the dismissed employee's option, thus eliminating the confusion caused by the current School Code dismissal section. Since a hearing by a school board is not a totally unbiased proceeding,[126] this forum for review should have the support of teachers and teachers' unions. It should also satisfy employer school districts, because the hearing examiner[127] would be perceived as more impartial than are arbitrators.

A third possible solution is the passage of a School Code amendment whereby teachers would give up School Code dismissal protections in exchange for "just cause" arbitration of all teacher job security issues. While this amendment would undo an established aspect of the teacher tenure system, the foundation of teacher tenure, the protection of employees from arbitrary employer actions, would remain intact and flourish.

The General Assembly should analyze the merits of each of these proposed solutions. All would return a significant degree of protection to the professional employee. Nevertheless, the alteration of a hearing from a mandate to a right is probably the simplest solution.[128] This was actually the practice until *Neshaminy*, and it has worked well with suspensions and demotions.[129]

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124. Senate Bill 519 would amend Section 11-1127, and provide for a hearing examiner in dismissal cases. The Bill provides, among other things, that dismissed professional or temporary professional employees have the right to be notified of reasons for their dismissal, and are entitled at their request, to a hearing before a neutral hearing examiner selected by the Secretary of Education.

125. Arbitrators are selected from a list of seven people provided by the American Arbitration Association or Bureau of Mediation. The employer strikes three names from the list and the union strikes three names; the remaining name is the arbitrator who hears the case.

Since arbitrators are paid by both the employer and the union, an arbitrator cannot stay in business if he is perceived by employers as pro-union. Nevertheless, arbitrators as a class are, rightly or wrongly, sometimes viewed as leaning toward the sympathies of the employee. *See* PA. STAT. ANN. tit. 43, § 1101.903 (Purdon Supp. 1983-84).

126. *See supra* note 84 and accompanying text.

127. A former PSEA attorney stated that many other states have neutral hearing examiners reviewing teacher dismissals, and that to her knowledge, Pennsylvania's school board hearing system is definitely in the minority. Telephone Interview with Catherine C. O'Toole, General Counsel for the Washington [State] Education Association (October 10, 1983).

128. It is the simplest solution for several reasons. First, the parties would not have to make any changes in bargaining strategy or other action because they have been acting under the presumption that a dismissal could be reviewed in either of the two forums. Second, it would not require any lengthy committee hearings or reports, or delays due to the debate of the merits, again because it has actually been in practice prior to *Neshaminy*. Additionally, it would involve a scheme of legislation already known in Pennsylvania.

129. *See supra* notes 89-98 and accompanying text.

## IV. Judicial Standards of Review in *Neshaminy*

### *A. Arbitrability*

This comment has thus far focused on the impact of the *Neshaminy* opinion that professional employee dismissals are not arbitrable, which was actually the second matter addressed by the supreme court.[130] Ironically, however, the court never should have reached the issue of arbitrability. It instead should have limited its inquiry to whether the arbitrator's award rationally could have been derived from the collective bargaining agreement.[131] The proper time for questions of arbitrability to be raised and decided is, logically, *before* the parties proceed to arbitration, rather than after arbitration hearings are completed.[132]

Under Pennsylvania law, a party opposing arbitration may challenge the arbitrability of the dispute by seeking an injunction in the court of common pleas.[133] Under the appropriate judicial inquiry, only such matters will be excluded from arbitration as are specifically reserved by the parties in the collective bargaining agreement. The court must decide only two questions: (1) was there an agreement to arbitrate; (2) can it "be said with positive assurance that the arbitration clause involved is not susceptible to an interpretation that covers the asserted dispute."[134] The court may not expand its inquiry because by doing so it may be deciding a substantive question that is

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130. *See Neshaminy*, at 501 Pa. 547-50, 462 A.2d at 636-37.

131. *See infra* notes 163-171 and accompanying text.

132. Issues of arbitrability should generally not be decided *after* the parties have proceeded to arbitration. Otherwise, a party may be allowed to challenge arbitrability twice, both before and after arbitration. A party could unfairly get two chances to prevail by arguing the dispute on the merits, and then, if the decision is adverse to that party, by being afforded an opportunity to challenge arbitrability of the dispute on appeal.

133. The opposing party may refuse to arbitrate and force the other party to file suit to compel arbitration. Section 7304 of the Uniform Arbitration Act provides in part:

> (a) Compelling arbitration.—On application to a court to compel arbitration made by a party showing an agreement [to arbitrate] . . . and a showing that an opposing party refused to arbitrate, the court shall order the parties to proceed with arbitration. If the opposing party denies the existence of an agreement to arbitrate, the court shall proceed summarily to determine the issue so raised and shall order the parties to proceed with arbitration if it finds for the moving party. Otherwise, the application shall be denied.
>
> (b) Stay of arbitration.—. . .[T]he court may stay an arbitration on a showing that there is no agreement to arbitrate. When in substantial and bona fide dispute, such an issue shall be forthwith and summarily tried and determined and a stay of the arbitration proceedings shall be ordered if the court finds for the moving party. If the court finds for the opposing party, the parties shall proceed with arbitration.

Act of October 5, 1983, Pub. L. No. 142, PA. CONS. STAT. ANN. tit. 42 § 7304 (Purdon Supp. 1983-84).

134. Lincoln Univ. v. Lincoln Univ. Chapter of the Am. Ass'n of Univ. Professors, 467 Pa. 112, 119-23, 354 A.2d 576, 580-82. *See also* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960).

properly within the jurisdiction of an arbitration.[135] Obviously, the judicial standard is narrow; any dispute which is even arguably covered by the arbitration provision in question must be returned to the arbitrator.[136]

In *Neshaminy*, the school district did challenge the arbitrability of Hess's grievance by seeking a court injunction. The court of common pleas, without further opinion, refused to enjoin arbitration of the dispute.[137] Had the court issued an opinion, it would have unquestionably had to find that the dispute was at least arguably covered by the agreement's discipline provision.[138] Procedurally, then, the Neshaminy school district was permitted to challenge arbitrability of the dispute before proceeding to arbitration. Substantively, the court refused to enjoin arbitration and had to have determined that the dispute was arbitrable under the proper judicial standard for inquiry.

Under the Uniform Arbitration Act, a court may vacate an arbitration award in limited circumstances.[139] Where the opposing party *did not* seek to *stay* arbitration prior to arbitration hearings, but nevertheless raised objections to arbitrability, that party may seek to vacate the award in court.[140] The Neshaminy school district was, however, granted the opportunity to challenge arbitrability in a

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135. *See supra* note 134.

136. *See supra* note 134.

137. The district's suit to enjoin arbitration was denied, without further opinion. On appeal of the arbitration award, the court of common pleas stated that:

> [the] District filed . . . a Complaint in Equity against . . . the Neshaminy Federation of Teachers and the American Arbitration Association requesting a temporary order restraining the latter from holding a hearing. . . . The court record of the case reflects merely that the application for a temporary order was denied.

Neshaminy School Dist. v. Neshaminy Fed'n of Teachers, 34 Bucks Co. L. Rep. 216, 216-217 (Comm. Pl. 1980).

138. See *supra* note 12 for text of discipline provision. See *infra* notes 164-71 and accompanying text for discussion of the reasonableness of interpreting the discipline provision to encompass dismissals.

In a suit to enjoin arbitration, a court may not determine the reasonableness of a proposed contract interpretation, but only whether it can be said with positive assurance that the contract is not subject to such an interpretation. The arbitrator will then conduct a more in-depth inquiry into the agreement, and determine whether the parties actually intended to have the dispute arbitrated. In *Neshaminy*, the arbitrator determined that the dispute was arbitrable after consideration of several factors. *See infra* notes 164-75 and accompanying text. *See also* ELKOURI, *supra* note 66 at 170-180.

139. The Uniform Arbitration Act provides in part:

> (a) General Rule.
>
> (1) On application of a party, the court shall vacate an award where:
>
> ***
>
> (v) there was no agreement to arbitrate and the issue of the existence of an agreement to arbitrate was not adversely determined in proceedings under section 7304 (relating to proceedings to compel or stay arbitration) and the applicant-party raised the issue of the existence of an agreement to arbitrate at the hearing.

140. The standard of judicial inquiry is no more expansive at this stage than it would have been in a suit to stay arbitration. *See supra* notes 133-138 and accompanying text.

suit to stay arbitration. Under the applicable provision of the Uniform Arbitration Act, the supreme court therefore could not have vacated the arbitrator's award.[141]

A proper review of the arbitrator's award in *Neshaminy* should have utilized the well-established "essence test,"[142] and not the test for determining arbitrability. In *Neshaminy*, the supreme court apparently determined what the *result* of the case should be—that Hess's dismissal be affirmed as being for just cause[143]—and then attempted to find some law to support such a result.[144] In so doing, the court applied a test of arbitrability,[145] which was not appropriate in this case. The Commonwealth Court's decision in the *Neshaminy* case reviewed the arbitrator's award under the proper theory of law, the "essence test." Nevertheless, the commonwealth court misapplied the "essence test" in reaching its decision to overturn the arbitrator's award.[146] The supreme court probably recognized this and realized that it could not properly overturn the arbitrator's award under the "essence test," and thus turned to a discussion of arbitrability. A correct application of the proper standard of judicial review by both courts would have led to a different result: affirmation of the arbitrator's award.

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141. Under § 7302 of the Uniform Arbitration Act, a court "shall . . . modify or correct the award where the award is contrary to law and is such that had it been a verdict of a jury the court would have entered a different judgment or a judgment notwithstanding the verdict." PA. CONS. STAT. ANN. tit. 42 § 7302 (Purdon Supp. 1983-84).

In *Neshaminy*, the district argued that the arbitrator's determination *that Hess's dismissal was not for just cause* was illegal. Brief for the Neshaminy School District at § 4-28, *Neshaminy*, *supra* note 9. This provision then is essentially designed to counter *factual* determinations which are against the law by applying a judgment n.o.v. standard. The school district did not challenge the legality of arbitrating dismissals under this section, nor did the supreme court utilize the section in its analysis. Under the judgment n.o.v. standard of section 7302, the challenge to the legality of arbitrability is apparently beyond the scope of the section.

142. *See infra* notes 152-162 and accompanying text.

143. The arbitrator's determination that Hess' dismissal was for just cause is most questionable. But so long as that determination drew its essence from the collective bargaining agreement, the courts could not properly reverse the arbitrator's award on the just cause determination.

144. *See infra* notes 190-195 and accompanying text.

145. *Neshaminy*, 501 Pa. at 539-50, 462 A.2d at 632-37.

146. The Commonwealth Court stated that the arbitrator incorrectly posed the issue as whether Hess was *dismissed* for just cause, whereas he should have inquired as to whether Hess was *disciplined* for just cause. After stating that "[t]he essence test requires a determination as to whether the terms of . . . agreement encompass the subject matter of the dispute," the court held that the dispute was not arbitrable because "discipline" and "dismissal" are not interchangeable concepts, and the arbitrator addressed the issue of "dismissal" in his award. *Neshaminy*, 59 Pa. Commw. 63, 67-68, 428 A.2d 1023, 1025 (1981).

The arbitrator, however, first determined that "dismissals" were covered by the "discipline" clause, *see infra* notes 164-175 and accompanying text, and then concluded that the dismissal was not for just cause. The commonwealth court, in determining that "dismissals" were not covered by the "discipline" provision, substituted its interpretation of the provision for that of the arbitrator. In so doing, the court violated the core of the "essence test." *See infra* notes 176-199 and accompanying text.

### B. *The Essence Test*

Although it is well settled that an appellate court may not substitute its judgment for that of an arbitrator,[147] the Pennsylvania Supreme Court apparently did just that in *Neshaminy*. Under the accepted standard of review, an appellate court may not overturn the arbitrator's award so long as the award draws its essence from the collective bargaining agreement.[148] The arbitrator exceeds his authority only if he goes outside the terms of the agreement in granting his award.[149] The "essence test" is an appropriate, court sanctioned standard that has withstood the test of time.[150] Legitimate controversy arises only when courts misapply it.[151]

### C. *Origin and History Of The Essence Test*

The "essence test" originated in the private sector with the United States Supreme Court's decisions in the Steelworkers' Trilogy.[152] In announcing the "essence test," the Supreme Court held that courts should not question the merits of a labor arbitration award merely because their interpretation of the contract differed from the arbitrator's interpretation. Although a thorough historical review of the evolution of the "essence test" is outside the scope of this comment, several important decisions[153] in the Commonwealth of Pennsylvania since the Steelworkers' Trilogy are noteworthy. In *Ludwig-Honold Manufacturing Co. v. Fletcher (Ludwig-Honold)*,[154]

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147. *See* Scranton Federation of Teachers v. Scranton School Dist., 498 Pa. 58, 444 A.2d 1144 (1982); Leechburg Area School Dist. v. Dale, 492 Pa. 515, 424 A.2d 1309 (1981); Leechburg Area School Dist. v. Leechburg Educ. Ass'n, 475 Pa. 413, 380 A.2d 1203 (1978); Bristol Twp. Educ. Ass'n v. Bristol Twp. School Dist., 74 Pa. Commw. 445, 460 A.2d 387 (1983); Greater Johnstown Area Vo-Tech School v. Greater Johnstown Area Vo-Tech Educ. Ass'n, 69 Pa. Commw. 208, 450 A.2d 787 (1982).

148. *See supra* note 147.

149. *See supra* note 147.

150. *See supra* note 147.

151. Ironically, Justice Flaherty indicated his impatience with lower courts misapplying the essence test only three years ago in Leechburg Area School Dist. v. Dale, 492 Pa. 515, 424 A.2d 1309 (1981). Now Justice Flaherty joins the unanimous court in *Neshaminy* in misapplying the essence test. In *Leechburg*, Justice Flaherty sharply stated:

> I join the majority opinion with the hope that we have *now* made it clear, after repeatedly so holding, that the ". . . arbitrator in analyzing (a) dispute may have failed to properly perceive the question presented or erroneously resolved it, but that does not provide justification for judicial interference. Our inquiry ends once it is determined that the issue properly defined is within the terms of the agreement."
>
> So be it!

*Id.* at 522, 424 A.2d at 1313 (Flaherty, J., concurring) (emphasis in original).

152. The Steelworkers Trilogy refers to United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960), United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960) and United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

153. *See supra* note 147; *see also* Comment, *Judicial Review*, *supra* note 1, at 802-11.

154. 405 F.2d 1123 (3d Cir. 1969).

the award of an arbitrator was propelled to near-exalted status.[155] The court reasoned that the "essence test" is satisfied if the arbitrator's interpretation . . .

> can in any rational way be derived from the agreement viewed in light of its language, its context, and other indicia of the parties intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award.[156]

Thus, the judicial review of an arbitrator's award is extremely narrow.

With the enactment of Act 195 arbitration of public sector labor disputes in Pennsylvania became mandatory.[157] The Act did not, however, prescribe any guidelines for the standard of judicial review of the arbitrator's award.[158] After a series of Pennsylvania Supreme Court cases attempted to establish a definite standard in the public sector,[159] it appeared in the past several years that the supreme court had conclusively settled on the "essence test." Nevertheless, courts continue to cite the "essence test" as mandatory,[160] and yet misapply it[161] or ignore it altogether.[162]

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155. *See* Comment, *Judicial Review*, *supra* note 1 at 800. *See supra* notes 158-162 and accompanying text.

156. *Ludwig-Honold*, 405 F.2d at 1128.

157. Section 903 of Act 195 provides in part:

> Arbitration of disputes of grievances arising out of the interpretation of the provisions of a collective bargaining agreement is mandatory. The procedure to be adopted is a proper subject of bargaining with the proviso that the final steps shall provide for a binding decision by an arbitrator. . . .

PA. STAT. ANN. tit. 43, § 1101.903 (Purdon Supp. 1983-84).

158. In some states which have public labor relations acts, the statutes do contain standards for judicial review of arbitration awards. *See, e.g.*, ALASKA STAT. § 23.40.200 (1981); CONN. GEN. STAT. ANN. § 7-474 (j) (3) (West Supp. 1983); ME. REV. STAT. ANN. tit. 26 979-M (West Supp. 1983-84); MICH. STAT. ANN. § 17.455(42)(Callaghan 1983-84); WASH. REV. CODE § 41.56.450 (West Supp. 1983-84).

159. After Act 195 was enacted, the commonwealth court had to determine the appropriate standard of review, and adopted the essence test. Teamsters Local Union No. 77 v. Pennsylvania Turnpike Comm., 17 Pa. Commw. 238, 331 A.2d 588 (1975). In subsequent years, however, the Pennsylvania appellate courts adopted different standards of review. *See* International Bhd. of Firemen and Oilers v. School Dist. of Philadelphia, 465 Pa. 356, 366, 350 A.2d 804, 809 (1976) (court did not adopt a standard because the arbitrator's construction of the agreement was reasonable); Community College of Beaver County v. Community College, Society of Faculty, 473 Pa. 576, 375 A.2d 1267 (1977) (judgment notwithstanding the verdict and illegality standards applied to arbitrator's determination); Leechburg Area School Dist. v. Leechburg Educ. Ass'n, 475 Pa. 413, 380 A.2d 1203 (1977) (Beaver County standard ignored); County of Allegheny v. Allegheny County Prison Employees Indep. Union, 476 Pa. 27, 381 A.2d 849 (1979) (essence test applied). For a complete analysis of the adoption of a standard for reviewing an arbitrator's award, see Comment, *Judicial Review*, *supra* note 1, at 802-10.

160. *See supra* notes 147-150 and accompanying text.

161. *See supra* note 44 and accompanying text.

162. Although discussing the "essence test," the court in *Neshaminy* actually decided the issue of arbitrability of professional employee dismissals using a pre-arbitration arbitrability standard. *See supra* notes 129-161 and accompanying text. Issues of arbitrability

### D. *Applying The Essence Test*

If it had properly applied the "essence test," the *Neshaminy* court should have affirmed the arbitrator's award. Even if the court unanimously agreed that the arbitrator's interpretation was wrong, it should not have substituted its judgment for that of the arbitrator. After reading the collective bargaining agreement as a whole, and considering all relevant indicia of the parties' intentions,[163] the arbitrator reasonably concluded that (1) dismissals are included in the just cause discipline clause, and (2) Hess' dismissal was not for "just cause."

*1. The Ordinary Meaning of Discipline.*—When construing a written document, the factfinder attempts to give words or phrases their clear and normal meaning.[164] In *Neshaminy*, the collective bargaining agreement provided that "an employee will not be disciplined . . . without just cause. Any such actions asserted by the Board . . . should be subject to the grievance procedure. . . ." The average person most likely views dismissal as a type, or subset, of discipline.[165] Dismissal is actually the ultimate form of discipline in the employer-employee relationship.[166] In *Neshaminy*, the school district contended that discipline means the strengthening of the mind or the building of character within an employee and that a dismissal is not an action consistent with this definition.[167] This, however, is

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should be resolved prior to arbitration.

163. *See supra* notes 66, 156 and accompanying text.

164. If the language of a collective bargaining agreement is clear and unambiguous, an arbitrator must not give those words in question an interpretation other than that clearly expressed. ELKOURI *supra*, note 66 at 303.

In ELKOURI, the authors discussed the standard that arbitrators must give words their plain and ordinary meaning.

> Arbitrators give words their ordinary and popularly accepted meaning in the absence of anything indicating that they were used in a different sense or that the parties intended some special colloquial meaning. For instance, the word "may" has been given its ordinary "permissive" meaning in absence of strong evidence that a mandatory meaning was intended. The words "day" or "workday" ordinarily must be construed as a calendar day, from midnight to midnight.

*Id.* at 305-06 (footnotes omitted).

Thus, if possible, the arbitrator in *Neshaminy* had a duty to give the term "discipline" its ordinary meaning when interpreting the collective bargaining agreement.

165. Just as "may" ordinarily denotes a permissive meaning, the ordinary meaning of "discipline," especially used in the context of a contract job security provision, is "punishment" or "reprimand." A dismissal is certainly a form of punishment; it is the most severe form of punishment that an employer may inflict on an employee.

166. The arbitrator stated in has award that "conventionally discharge may be viewed as the ultimate application of discipline. The cliche 'industrial capital punishment' has been used to describe discharge . . . Discharge obviously is the ultimate form of discipline and therefore must be reviewed as being inherent in (the just cause discipline provision)." *Arbitration Award*, *supra* note 22, at 8-9.

167. Brief for Neshaminy School District at 13-14, Neshaminy Federation of Teachers v. Neshaminy School District, *supra* note 9.

but one type of discipline: the type that a football coach employs to instill mental toughness or determination in his players, for example.[168] The provision in the collective bargaining agreement, however, did not refer to this type of discipline. Rather, the definition of "discipline" as "to punish or chastise"[169] is more consistent with the term as it is used in the contract.

The Neshaminy School District recognized in its own "Work Regulations and Guidelines" this definition of discipline which stated: "[t]he following are representative causes of disciplinary action, *including dismissal.* . . ."[170] Thus, the District admitted that a dismissal was indeed a form of discipline; the "Work Regulations and Guidelines" was a clear indication of the parties' intentions in the collective bargaining agreement.[171] The arbitrator was therefore reasonable in his conclusion that dismissals were included in the discipline provision.

*2. Accepted Practice of Arbitrating Dismissals.*—Additionally, in light of the supreme court decisions in *Philadelphia Federation of Teachers* and *Pittsburgh*, as well as the prevailing view of school districts statewide that dismissals were arbitrable[172] and that section 703 of Act 195 would not operate to

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168. Were an arbitrator to apply this interpretation to the "discipline" provision, the contract would produce harsh and absurd results. Under this interpretation, an employer could give an employee an official written reprimand if he committed some infraction of school district policy. This would be discipline under the Neshaminy School District's argument. If the employee committed a second offense, the employer could demote the employee, and this too would be a form of discipline. A third offense could lead to a disciplinary suspension, again a form of discipline. But, if on the fourth offense, the employer fired the employee, the employer could contend that this is not discipline. Thus, an employee could file a grievance under the first three disciplinary actions, but not when ultimately dismissed, an absurd result that allows comparatively minor employer actions to trigger the grievance procedure, but not the ultimate employer action. *See supra* note 166 and accompanying text.

As one commentator states, "[w]hen one interpretation of an ambiguous contract would lead to harsh, absurd, or nonsensical results, while an alternative interpretation, equally consistent, would lead to just and reasonable results, the latter interpretation will be used." ELKOURI, *supra* note 66, at 309 (footnote omitted). Elkouri illustrates this standard of interpretation with the phrase "active employ." Under this standard, interpretation of "active employ" would have an absurd result if persons who were absent from work on a specified day due to illness or other valid reason were said not to be in the "active employ" of the company.

169. *Webster's New Collegiate Dictionary* 237 (7th Ed. 1967).

170. Neshaminy School District, *Work Regulations and Guidelines, quoted in Arbitration Award, supra* note 22, at 5.

171. The District's *Work Regulation and Guidelines* was not a provision of the collective bargaining agreement. It was, however, a statement of policy by the District that set forth standards for disciplinary action, which, as the District stated, included dismissals. Thus, the *Work Regulations and Guidelines* are not only helpful for determining the District's definition of the term "discipline" in the abstract, but are clear evidence that the District intended discipline to include dismissals in the precise issue dealt with in the *Neshaminy* case.

172. In Comment, *A Power Shift*, *supra* note 1, the author discussed the impact of the *Philadelphia Federation of Teachers* decision on the arbitrability of grievances:

> Although appellant in *Philadelphia Federation of Teachers* was a nontenured teacher, the legal and policy arguments the court advanced apply equally to the dismissal of a tenured teacher for just cause. Since two of the cases upon which

void a dismissal clause,[173] it was reasonable to conclude that the parties intended dismissals to be arbitrable.[174] As previously stated, by the mere inclusion of the "not-to-supersede-applicable-law" provision, the District could not conceivably have intended that dismissals not be covered in the collective bargaining agreement, especially since such language never before had operated in such a manner.[175]

Thus, even reading this clause as having great meaning, it still appears that the parties' intentions were that dismissals be included in arbitration. Considering the ordinary usage of the terms "dismissal" and "discipline," the District's own admission that discipline includes dismissal, as well as accepted practice, it was reasonable for the arbitrator to hold that "dismissals" were indeed included in the collective bargaining agreement.

### *E. The Reasonableness Of The Arbitrator's "Just Cause" Determination*

*1. Compatability of "Just Cause" Standard and Statutory Causes for Dismissal.*—Having determined that "dismissals" were properly included within the contract's "discipline" clause, the arbitrator focused on whether the dismissal was for "just cause." If a statute prescribes standards for an employer action and the parties to a collective bargaining agreement nevertheless negotiate a "just cause" clause with respect to that action, the supreme court will uphold the "just cause" provision under two constructions.[176] Absent evidence to the contrary, the court will presume: (1) that the arbitra-

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> the court relied involved tenured teachers, it appears that a teacher, tenured or nontenured, can elect a hearing before an arbitrator rather than the school board.
>
> The procedures for a hearing dismissing a tenured teacher are more detailed and offer greater procedural safeguards than a hearing under Section 514 of the School Code. The conclusion that a school board is not illegally delegating its authority by submitting a dismissal to binding arbitration applies equally, however, to the dismissal of a tenured teacher.

*Id.* at 816, 816 n.179 (footnote omitted).

173. In West Shore School Dist. v. Bowman, 48 Pa. Commw. 104, 409 A.2d 474 (1979), the *district* argued that an employee was *required* to submit her grievance over her *dismissal* to arbitration, pursuant to a "just cause dismissal" provision. *Id.* at 108, 409 A.2d at 477. The court held that the matter did not have to be submitted to arbitration because the dispute dealt solely with whether the professional employee's discharge violated procedural rights guaranteed by the School Code. In recognizing that different issues might have brought the dismissal under the grievance procedure, the court reasoned that . . .

> [h]ad Bowman's appeal to the Secretary [of Education] been concerned solely with the substantive reasons for her termination, the matter would be arguably arbitrable . . . [but] [b]ecause we are concerned with procedure and because the collective bargaining agreement does not contain provisions relating to termination procedures, this matter is not a proper one for arbitration.

*Id.* at 109, 409 A.2d at 478.

174. *See Arbitration Award, supra* note 22, at 24-29.

175. *See supra* notes 52, 72, 99-100 and accompanying text.

176. *Philadelphia Federation of Teachers*, 464 Pa. at 102-106, 346 A.2d at 41-43.

tor's "just cause" standard is identical to the statutory reasons *or*, (2) that the "just cause" standard includes the statutory reasons *and* other additional reasons.[177] Thus, in *Neshaminy*, the "just cause" standard would be interpreted as "immorality" or as including "immorality" and other acceptable reasons for dismissal. Under the second standard, then, the court will review the employer's action more broadly, and thus the tradeoff of a board hearing for arbitration will be equitable.

*2. Application of these Standards.*—In *Neshiminy*, the arbitrator concluded that Mr. Hess's dismissal was not for just cause because of several factors.[178] The school district's dismissal of Hess was discriminatory, considering its less severe treatment of other seemingly immoral offenses.[179] For example, four months prior to Hess's arrest, the Board President became drunk and broke into his former wife's house. Within a week he repeated his action. He was arrested on both occasions, but continued to serve on the Board with impunity.[180] Additionally, a teacher who exposed his genitals to a female student, and a male teacher who struck a female teacher were not dismissed.[181]

Furthermore, the record indicated that Hess's behavior did not stir the wrath of the community. Surprisingly, it does not even appear that the community was aroused.[182] Hess continued to teach after the incident without causing problems for the District or for the students. The arbitrator concluded that the incident occurred outside the school setting and evidently had little impact on the public, the students, or Hess' ability to teach.[183]

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177. *Id.*

178. *See infra* notes 179-188 and accompanying text.

179. The arbitrator concluded that there must be "some demonstration that all other teachers were subject to the same standards of scrutiny and evaluation." *Arbitration Award*, *supra* note 22, at 25. In discussing the treatment of a Board President who had been twice arrested for trespassing while intoxicated in his ex-wife's house, the arbitrator reasoned that "it is difficult to attempt to weigh the lesser crimes of the Board President and his much lesser punishment with the fate of Mr. Hess. Suffice it to say, both were ill, both accepted treatment and hopefully both are whole." *Arbitration Award*, *supra* note 22, at 25-26.

180. The Board President stepped down from his office as President, but remained a Board member. The Board took no action to have him discharged from the Board. *Id.* at 22. Somewhat ironically, he voted to discharge Mr. Hess. *Id.*

181. Several months after exposing his genitals to a female student, the teacher was involved in "another incident" with the same student. He was then permitted to resign. *Id.* The male teacher who struck his female colleague received a reprimand. *Id.*

182. On this point the arbitrator concluded that Mr. Hess's behavior had not caused problems for the District or students. "The one newspaper clipping [mis]identified Bensalem [School District] as his employer. That community actually has been employing him with no apparent ill effects. If anything, this combination of a faulty news item and his employment by Bensalem simply strengthens the belief that the incident had little impact and that the public has short memory in these matters." *Id.* at 25-26.

183. The Board originally included "incompetence" as a ground for Hess's dismissal, but dropped this argument at the Board hearings. *Id.* at 25.

The arbitrator also reasoned that the cause of Hess's actions on the night of September 24, 1978 was not immorality, evil, or wickedness, but was, rather, an illness[184]—alcoholism.[185] At the time of Hess's dismissal, he was well on the road to recovery.[186] The arbitrator viewed Hess' actions as those of a sick man who needed help, not an immoral man who deserved punishment. Of his own free will, Hess sought and received help and was, at the time of his dismissal, a rehabilitated man.[187] Since his teaching ability did not suffer, and the court of common pleas punishment was less severe than the punishment by the Board,[188] the arbitrator was arguably within the limits of reason in concluding that Hess' dismissal was not for "just cause."[189]

### *F. Reasons Behind The Neshaminy Decision*

If the arbitrator's decision was, in fact, "rationally derived from the collective bargaining agreement," then the supreme court decision was in error. This case probably presented the court with facts upon which it felt it could not allow the grievant's dismissal to be overturned.[190] A factual view of the incidents of the night of September 24, 1978 would reasonably lead the ordinary person to believe that a person who committed the same acts as Hess should not be teaching young school children.[191] The court cannot be criticized for its conclusion that Hess should have been dismissed. Nevertheless,

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184. Today, alcoholism is recognized as a disease, rather than a moral or social abnormality. *See generally National Institute of Mental Health and National Institute on Alcohol Abuse and Alcoholism, Recent Advances in Studies of Alcoholism: An Interdisciplinary Symposium* (1970).

185. The arbitrator reasoned that Hess' acts "were the acts of a sick man. Alcoholism is an illness. Society is best served if the illness is cured rather than if all acts resulting from the illness are punished." *Arbitration Award, supra* note 22, at 27.

186. *See supra* note 26 and accompanying text.

187. The arbitration award reveals that Hess showed "all the signs of rehabilitation. He went to . . . all avail [sic] forms of therapy and rehabilitation: an alcoholic treatment center, AA, a psychiatrist, and marriage counseling. . . . He no longer drinks. That is a key to rehabilitation." *Arbitration Award, supra* note 22, at 28.

188. The arbitrator concluded that there was a disparity between the fifteen days of limited confinement to which he was sentenced by the court, and termination of his employment which was imposed by the District. *Id.* at 28-29.

189. *See Arbitration Award, supra* note 22, at 25-30.

190. *See supra* notes 22-26 and accompanying text.

191. Legal staffs for labor unions have an obligation to represent the interests of their members by representing the interests of the union as a whole. When an employee alleges wrongful dismissal, the union will review the case and determine whether the facts merit taking the case to arbitration. Before deciding to arbitrate the grievance, it must balance the grievant's chances of success against the potential consequences to the organization as a whole should an appellate court review the case and reject the union's argument.

Obviously, when looking at the case in retrospect, the facts in *Neshaminy* were such that the Federation of Teachers should not have appealed the decision to the Supreme Court. It would have been prudent, instead for the Federation not to have appealed the case because: (1) it was foreseeable that the court might hold against Hess because of the bad facts of the case; and (2) such a holding could result in unforeseen damage to the union's aims, which are broader than Hess' interests.

the *Neshaminy* decision was essentially result-oriented, and its ultimate result is in derogation of the principles of teacher tenure.[192]

Furthermore, by declaring that the "essence test" is the proper standard of review and yet reviewing the arbitrator's award under an arbitrability test, the supreme court has demonstrated its inability to nail down the "essence test," both in theory and in practice. *Neshaminy* creates new confusion that may take years to resolve. As previously noted, it has only seemed clear that appellate courts were applying the "essence test" in the public sector in the past several years.[193] The court in *Neshaminy* quoted the "essence test,"[194] and yet fully reviewed the arbitrator's award on the merits, because of either a misapplication of or dissatisfaction with the "essence test".[195]

### *G. The Essence Test—Is It Appropriate In The Public Sector?*

The "essence test" is not the universally accepted proper standard of review of arbitration awards in the public sector.[196] Proponents of a broader standard of review argue that since arbitration in the public sector is mandatory,[197] rather than agreed to by the parties at the bargaining stage, the scope of review should therefore be broader.[198] Although this argument has superficial appeal, it is actually without merit.

The General Assembly, by enacting Act 195 and making public sector arbitration mandatory, has in essence contracted on behalf of all public employers and employees to utilize arbitration to resolve

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192. *See supra* notes 80-98 and accompanying text.

193. *See supra* notes 152-162 and accompanying text.

194. *Neshaminy*, 501 Pa. at 540-41, 462 A.2d at 632.

195. In *Neshaminy*, the Pennsylvania Supreme Court stated that interpreting "discipline" to include "dismissal" was untenable. *Id.* at 542, 462 A.2d at 633. The court reasoned that the mere mention of the term "dismissal" in another section of the agreement refuted the contention that the parties intended to include "dismissals" within the "discipline" clause. *Id.* at 543-44, 462 A.2d at 634. The court stated further that analysis of the School Code dismissal provisions, *see supra* notes 28, 29, and section 703 of Act 195 "compels the conclusion that [the contract] must be interpreted as excluding 'dismissal' from mandatory arbitration." *Id.* at 547, 462 A.2d at 635. The court reached this conclusion because of its reliance on the parties' agreement not to supersede the School Code. *Id.* at 542-43, 462 A.2d at 633-34.

It is unimportant here to determine whether the *Neshaminy* court's conclusion on the parties' intent was reasonable, because, as discussed, *supra*, at text accompanying notes 130-136, the court should not even have attempted to make such an analysis. Under the "essence test," the court had to determine whether the arbitrator's interpretation could *in any way* be derived from the agreement, viewed in light of its language, its context, and any other indicia of the parties' intention . . ." *Id.* at 540-41, 462 A.2d at 632 (quoting *Ludwig-Honold*, 405 F.2d at 1128) (emphasis added). The arbitrator's award did not have to be the *most* reasonable interpretation of the agreement provision; it merely has to be *a* reasonable interpretation. Nevertheless, the *Neshaminy* court concluded that "*we* are satisfied that the terms of the Agreement do not encompass the . . . dismissal of a tenured employee." *Id.* at 541, 462 A.2d at 632 (emphasis added).

196. *See* Comment, *Judicial Review*, *supra* note 1, at 811-15.

197. *See supra* note 8 and accompanying text.

198. *See* Comment, *Judicial Review*, *supra* note 1, at 811-12.

all disputes. Thus, mandatory arbitration should not be reviewed differently from voluntary arbitration. In addition, merely prescribing the forum and method for review of disputes does not make public sector arbitration any less suitable or more likely to be in error than private sector arbitration. Thus, no reason exists to scrutinize more closely the arbitrator's award in the public sector.

Additionally, the purpose of arbitration is to provide an alternative forum to the courts for dispute resolution. A broad standard of review encourages appeals to state courts and undermines the concept of binding arbitration. There is little reason at all to have arbitration if the courts are going to give the arbitrator's award a full scale review; binding arbitration will be turned into non-binding arbitration. The parties to the contract know in advance that matters of dispute will be arbitrated and neither party is surprised or disadvantaged by resolving disputes in this forum.

Finally, the taxpayers are paying for the litigation that follows arbitration. Where binding arbitration works well, there is no reason to allow a broad standard of review resulting in increased cost to taxpayers, through increased appeals, more crowded court dockets, increased time in resolving disputes and ultimately, more uncertainty in matters of public sector labor law.[199]

## V. Conclusion

In handing down the decision in *Neshaminy* and stating that the dismissal of a professional employee is not arbitrable, the Pennsylvania Supreme Court's legacy is a situation in which allegations of serious offenses are provided with less protection than allegations of minor ones.[200] Furthermore, nontenured teachers have greater protection than those with tenure by being afforded the opportunity to arbitrate their dismissals.[201] It is inconceivable that the Legislature could have ever intended this inequity in protection levels when it enacted the Public School Code and Act 195.

The burden is now on Pennsylvania's state lawmakers to rectify this imbalance and compensate for the harshness of *Neshaminy*. The Legislature should act to change the mandatory board hearing to a voluntary process,[202] thus providing all dismissed employees under the School Code with a choice of forums for reviewing their dismissals. Other School Code alternatives which are worthy of consideration include the review of all dismissals by a Neutral Hearing Exam-

199. *But see* Comment, *Judicial Review*, *supra* note 1.
200. *See supra* notes 89-98 and accompanying text.
201. *See supra* note 80-88 and accompanying text.
202. *See supra* notes 116-121 and accompanying text.

iner,[203] and the forfeiture by employees of tenure protections in exchange for the arbitration of all job security issues.[204]

Once it is agreed that the arbitration is the proper forum for the review of employer actions, state appellate courts must hesitate to overturn arbitrators' awards. The "essence test" for reviewing arbitration awards is appropriate in the public sector[205] and will lead to an efficient system of adjudication if Pennsylvania's appellate courts adhere to it, both in name and in application. Had this been the accepted view when the supreme court decided *Neshaminy*, the case would never have advanced to the state's highest court.

If the Legislature acts promptly, and the state appellate courts settle into a consistent pattern of application of the "essence test," the original purpose for teacher tenure will be accomplished. Less confusion will follow the area of public sector labor law, and it will, in turn, have a chance to succeed.

J. ERIC RATHBURN

203. *See supra* notes 122-127 and accompanying text.
204. *See supra* notes 127-129 and accompanying text.
205. *See supra* notes 152-162 and accompanying text.